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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. WHAT IS THE APPLICABLE LAW, OF THE EFFECT OF BANKRUPTCY RULE 6009 AND AS TO THE EFFECT OF PROCEEDING WITH LITIGATION AGAINST A BANKRUPT DEBTOR IN POSSESSION WITHOUT LIFTING OR MODIFYING THE AUTOMATIC STAY PROVIDED FOR DEBTOR'S PROTECTION UNDER 11 U.S.C. § 362(a) AS DECISIONS OF THE COURTS OF APPEALS ARE IN CONFLICT?

2. WHETHER THE ENTRY OF A JUDGMENT AWARDING $35,000,000 AND ORDER AUTHORIZING FORECLOSURE OF REAL AND PERSONAL PROPERTY WITHOUT SEEKING RELIEF FROM THE AUTOMATIC STAY IS A VIOLATION OF THE AUTOMATIC STAY, PURSUANT TO 11 U.S.C. § 326(a), SO AS TO RENDER JUDGMENT VOID?

3. WHETHER THE PETITIONER IN SEEKING DAMAGES FOR BREACH OF CONTRACT WHICH HAD NOT BEEN TERMINATED, WAS WRONGFULLY DEPRIVED OF ITS RIGHT TO JURY TRIAL WHEN THERE WERE CLEAR QUESTIONS OF FACT AND WHICH IS A PURELY LEGAL REMEDY ENTITLING PETITIONER TO JURY TRIAL?

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NO. _____

IN THE
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October Term, 1989

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE TENTH CIRCUIT COURT OF APPEALS

The petitioner, Bokum Resources Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals in Bokum Resources Corporation v. Long Island Lighting Company, No. 88-1948 (10th Cir. 1989).

OPINIONS BELOW

The order and judgment of the Tenth Circuit Court of Appeals Panel appears at No. 88-1948 (10th Cir. 1988), which was entered on February 14, 1989 and is reprinted in the Appendix hereto, pp. A-41-48. Rehearing was denied on March 22, 1989, and that order is reprinted and found in the Appendix, pp. A-35-36.

The decision appealed to the circuit court was that of the Federal District Court in Case No. 0202, Judge Juan G. Burciaga dated April 28, 1988, is also reprinted and included in the Appendix, pp. A-49-50.

The decision of the U.S. Bankruptcy Court for the District of New Mexico, dated December 9, 1985, appears at No. 81-00666, Adversary No. 82-0202, (B.Ct.N.M., 1985) and is reprinted and found in the Appendix, pp. A-70-83.

JURISDICTION

The decision of the Tenth Circuit Court of Appeals was decided February 14, 1989. Rehearing was denied on March 22, 1989. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved in the instant cause are Amendment VII of the United States Constitution, Title 11 U.S.C. § 362, Bankruptcy Rules 4001, 6009, 9014, 9027, Title 28, United States Code § 1452, which are all set out verbatim in the Appendix, pp. A-1-37.

STATEMENT OF THE CASE

On February 14, 1989, the United States Court of Appeals for the Tenth Circuit entered an order which upheld the lower court's decision dismissing BRC's claims against LILCO and affirming the lower court's opinion in favor

of LILCO on its counterclaims. On May 27, 1988, BRC filed its notice of appeal to the Tenth Circuit Court of Appeals. The Court entered an order; however, the order does not address the issues raised by BRC. The court, without even citing one case or other legal authority, failed to address the fundamental issue on appeal of BRC's right to trial by jury. The court failed to address the questions of whether a breach existed, notices required and declaration of a breach, and why a jury was not allowed to determine whether notice was required and was given to BRC by LILCO declaring either contract in breach. (U.S.C.A. order is reprinted and included in the Appendix, pp. A-41-48.)

This case involves two separate installment agreements between Bokum Resources Corporation (herein referred

to as "BRC"), as the seller, and Long Island Lighting Company (herein referred to as "LILCO"), as the buyer, to supply uranium. The contracts involve domestic uranium production. One contract was entered into on January 30, 1976, which is captioned, "Uranium Concentrates Purchase Contract", (herein referred to as "1976 UCPC"), which ultimately covered six million pounds of uranium. The other contract is dated July 21, 1978, and is for an additional four million pounds of uranium (herein referred to as "1978 UCPC"). Both contracts were introduced at trial but have not been added to the Appendix in the interests of brevity; however, both contracts are available at the Court's request.

LILCO filed suit in U.S. District Court for the District of New Mexico

Case CIV-80-912HB against BRC in a foreclosure proceeding on November 10, 1980. On June 12, 1981, LILCO and others filed an involuntary Chapter 11 petition against BRC and an order for relief was entered December 17, 1981. Since then BRC has remained in a Chapter 11 reorganization as debtor in possession. In February 1982, BRC initiated suit claiming LILCO breached the 1976 contract by failing to accept and pay for all deliveries to be tendered through September 1981, and thereby repudiated the remaining portions of the 1976 UCPC, as well as the entire 1978 UCPC. LILCO counter-claimed for repayment of all monies advanced to BRC under both contracts for foreclosure. Both cases were removed to Bankruptcy Court, consolidated, partially adjudicated and remanded to the U. S. District Court.

BRC's contract case and LILCO's claims were tried at the same time.

Jury trial commenced on February 8, 1988, before the United States District Court for the District of New Mexico, the Honorable Juan G. Burciaga presiding. At the close of BRC's case-in-chief, LILCO moved for a directed verdict, and the court dismissed all of BRC's claims (Appendix, pp. A-49-50), despite the fact that all parties and the court acknowledged the contracts had never been declared in "material breach." Thereafter, following a brief hearing on LILCO's counterclaim, the court entered its findings, conclusions and judgment on April 28, 1988. (Appendix, pp. A-51-69). The judgment recited BRC would "take nothing by its complaint", awarded $35,510,821.92 to LILCO, and allowed LILCO to foreclose on its 1976 and 1978 lease assignments

and security agreements. The judgment was entered without LILCO ever even applying for an order being entered granting relief from the automatic stay provided by § 362 of the Bankruptcy Code.

A. FACTUAL AND LEGAL HISTORICAL SUMMARY.

The following is a summary of the HISTORY LEADING TO THIS POINT. Uranium is a very speculative material. Since 1969, the price of "U_3O_8 contained in concentrates" or "yellowcake", has fluctuated. Since the beginning of 1981, the supply of yellowcake has exceeded demand, and there has been an abundance of the substance available for purchase and delivery. Thus, BRC would have been able to meet its obligation under the contracts.

The mining of uranium is risky. As such, there is a significant chance

for failure. Producers commonly provide for this uncertainty by placing "force majeure" clauses in their uranium supply agreements as was done by BRC and LILCO. Such best efforts consist of diligent efforts to obtain and employ knowledgeable miners and necessary equipment. The purpose of the force majeure clauses are designed primarily to excuse either party if there are occurrences which are beyond either parties control.

It is common practice in the industry for producers to purchase uranium from others to fulfill their contracts instead of mining it when the spot market price falls below the producers cost.

LILCO is an electric utility company on Long Island, New York. In 1973, LILCO started construction of its Shoreham Nuclear Power Station.

LILCO expected BRC to guarantee completion of the mine; however, it was advised that mining was a "risky business." As such, an agreement was made that BRC would use its "best efforts to sink a mine shaft on the property," and that LILCO would advance $15 million for general corporate purposes of BRC for the mine and for additional exploration drilling on the Marquez property. The advance was to constitute a credit in favor of LILCO against future deliveries of yellowcake. It could mine and mill the uranium or buy it. The 1976 UCPS was executed on January 30, 1976. It specified that the "concentrate shall be mined from deposits" in the Marquez property or "at [BRC's] option, from other properties located in the United States of America or elsewhere" (1976 UCPS Art. I(A)). The article further

only requires BRC to use its best efforts to "immediately commence development of and thereafter put into operation a uranium mine" on the Marquez property. At the time, other producers were pricing yellowcake for delivery in 1978 "in the low 30's," ($30/lb.). However, BRC agreed to lower prices because LILCO was to advance $15 million toward the mining venture.

LILCO claimed at trial that all uranium had to come from a BRC mine; however, LILCO described and interpreted the 1976 UCPC to its stockholders in December 1981 through "Bokum White Paper" which is reproduced in pertinent part in the Appendix at pp. A-84-85. In this document, LILCO specifically stated that "BRC was obliged" to deliver, "regardless" of the source including "purchasing" from "other sources."

Finally, Article 15 contained a default clause specifying that "if, and only if, [BRC] commits a defined 'Material Breach'" and "if [LILCO] so elects, the occurrence of such event shall constitute a material breach" and LILCO shall be entitled to declare the $15 million advance due and payable, recover from BRC any cover damages suffered by LILCO in obtaining yellowcake from other sources, and declare the 1976 UCPC terminated (emphasis added).

Various circumstances were described in the UCPCs in which LILCO could elect to use to declare a constituted "Material Breach", but did not do so. The exception to the material breaches arise when the breaching circumstances might be excused by an event of force majeure. For such occurrences, the stated Article 15 remedies were exclusive.

There is no question that BRC made good faith efforts to excavate the uranium and build a mill. By the fall of 1977, ten million pounds of economically recoverable uranium had been discovered on BRC property. The company which both BRC and LILCO anticipated would mill the ore would not be able to. LILCO agreed to finance construction of the mill.

Due to unanticipated floodage, on April 7, 1978, BRC declared force majeure under the 1976 contract, and the parties agreed to postpone the first deliveries of the yellowcake for one year and to otherwise change the delivery schedule. BRC never gave LILCO written notice that force majeure had ended, and there was no evidence that LILCO ever exercised its right to terminate and recover its advance. Furthermore, on April 7,

1978, LILCO exercised its option under Article 13 of the 1976 UCPC to purchase more.

On May 28, 1978, the mine shaft flooded again. Again, LILCO did not elect to call the contracts in material default.

The 1978 contract, as well as the separate mine and mill development financing agreements (herein referred to as "MMA"), were negotiated in June and July 1978, and made effective on July 21, 1978.

After the 1978 UCPC was made, BRC contined to complete the mine shaft and the mill. Yellowcake was never produced because the mine flooded again in January, 1980. Thereupon, BRC and LILCO agreed that if BRC would not declare another force majeure, LILCO would not declare BRC in default, thus enabling BRC to find a buyer for its

assets, including its right to sell uranium to LILCO.

On November 10, 1980, LILCO filed an action to foreclosure its mortgage against Marquez Mill. However, LILCO did not terminate the 1976 or 1978 UCPCs, and did not demand repayment of the advances. An involuntary Chapter 11 bankruptcy petition was filed against BRC by LILCO and others on June 12, 1981 which resulted in adjudication of bankruptcy (by entry of an order for relief) on or about December 17, 1981. The bankruptcy court pressed BRC to confirm a plan despite the extensive pending litigation, numerous unresolved issues necessary to effect a chapter 11 reorganization and unresolved claims. The court entered an order confirming a plan on August 15, 1985 subject to the bankruptcy court's continuing

pervasive jurisdiction over the estate, assets of the estate, all litigation, and to resolve all claims, subject to jurisdictional limitations, against BRC. The court has retained and reserved all jurisdiction and the stay remained in effect on the mine and the mill until further order of the court or closing the estate. LILCO never filed a motion to lift or modify the automatic stay. The court never entered an order modifying the stay so as to permit LILCO to proceed with litigation or to foreclosure. The estate has never been closed.

On August 10, 1981, BRC had obtained commitments, and BRC tendered delivery of 1,883,334 pounds of yellowcake to LILCO through letter form. The letter was directed to Thomas O'Brian, senior vice president of LILCO and can be found in the Appendix, pp. A-86-87. It was

intended to bring BRC current on its deliveries through August 31, 1981, and stated that the remaining balance of the deliveries for 1981, would be delivered at the required rate. Such an attempt for delivery was made on BRC's reliance on the contract and on the fact that LILCO had not declared a breach, and as such BRC was obligated to make said delivery. Up to the time BRC sent this tender letter, LILCO had not sought to cover any late deliveries by purchasing yellowcake on the open market, nor did they demand that BRC make deliveries or declare or notify BRC that it was in breach of the 1976 UCPC, or that it had been terminated, nor demanded that BRC repay the $15,000,000 advance. LILCO's only response to BRC's tender was stated in a letter dated September 3, 1981, which is in the Appendix at pp. A-88-89. In

the pertinent letter LILCO does not declare a material breach but rather specifically states that "LILCO has refrained from declaring BRC to be in material breach."

In response to LILCO's letter, Mr. Bokum sent a letter dated September 16, 1981, which can be found in the Appendix at pp. A-90-91. In this letter BRC affirms that it is prepared to deliver the uranium as the contract requires.

B. U.S. DISTRICT COURT LITIGATION.

This case was tried by BRC's trial counsel who did not represent BRC in the bankruptcy case. This writ is submitted by BRC's bankruptcy counsel.

On more than one occasion the trial court ruled that LILCO had not terminated the 1976 and 1978 contracts.

If LILCO had paid for all yellowcake tendered in 1981, the net

amount received by BRC, after deducting the credit due to LILCO and payment for the yellowcake, would have been sufficient to pay all of BRC debts and to remove it from bankruptcy.

The 1976 and 1978 UCPCs each contained a clause specifying that it

> shall be governed and construed in accordance with the laws of the State of New Mexico, including, without limitation, the Uniform Commercial Code as enacted and enforced

in New Mexico.

After presentation of all the above-described evidence and other evidence, the U.S. District Court summarily granted LILCO's first motion for directed verdict on February 10, 1988. LILCO's original motion for directed verdict did not include BRC's claim for LILCO's breach of the 1976 contract. Nevertheless, the trial court dismissed all BRC's claims. The

following day, LILCO amplified its motion to include BRC's breach of contract claim, and the trial court again dismissed all claims. In doing so, the trial court ruled that there was "nothing in evidence to support the contention of plaintiff that there was a repudiation of these contracts" or "wantonly or with reckless disregard with...any rights that plaintiff might have had under the contracts." The next day, in response to LILCO's second motion, the trial court also ruled, "no reasonable jury could find that there was...a conforming tender" by BRC, and that "it was proper for LILCO to reject the tender since it was nonconforming."

After the foregoing rules, the parties stipulated to the interest calculations, but not as to LILCO's entitlement to repayment or interest.

The court discharged the jury, and the trial court entered its findings, conclusions (Appendix, pp. 51-69) and judgment on LILCO's counterclaim on April 28, 1988 awarding $35,510,821.92 to LILCO and allowing it to foreclose its security interests. Again, no order for relief from the automatic stay was ever entered or obtained by LILCO. The findings and conclusions also were based on the evidence summarized above, and are set forth in full in the Appendix, pp. A-51-69.

Petitioner believes the fact issues set forth in the pleadings should have been presented to the jury and allowed the jury to reach their own conclusions.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

LILCO filed its foreclosure suit in U.S. District Court on November 10,

1980, and that case was combined with the BRC suit on breach of contract and both were tried in February 1988 before the U.S. District Court. BRC filed its contract case on February 19, 1982 in the District Court of the Thirteenth Judicial District, Cibola County, New Mexico, as Cause No. CV-82-35. The action was subsequently removed to the United States Bankruptcy Court for the District of New Mexico. The bankruptcy court denied LILCO's first motion for summary judgment ruling by order of August 15, 1984 that "With respect to the contract claim, however, issues of fact exist, and BRC should be accorded its day in court." The case was removed back to the U.S. District Court. The jurisdiction of the United States district courts was invoked under 28 U.S.C. § 1332, 28 U.S.C.

§ 157(b)(3) and 11 U.S.C. § 362. The jurisdiction of the court was not disputed at any stage of the litigation by any party.

Although petitioner's previous counsel appealed to the appropriate U.S. Appeals Court, petitioner acknowledges that the first two questions addressed in this writ were not raised in the district court or appeals court. However, there is case law in the arguments to support that the stay provided pursuant to 11 U.S.C. § 362(a) is automatic and as such did not require the petitioner to raise the issue. Furthermore, although the Court will not normally consider points or questions not raised below and in the petition, this Court has addressed the issues in various cases when sufficient reason to address the point exists. When

"purely legal questions" presented in the petition exist [as is the case at bar], it is appropriate for decision even though the question was not addressed by the lower court. Mitchell v. Forsyth, 472 U.S. 511 (1985).

Any restrictions that exist are certainly not jurisdictional or absolute. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, at 320, note 6 (1971). They have been created by the Court, and are subject to modification by the Court when it believes that the reasonable procedures embodied in the general rules are outweighed by other considerations. Id. Altnough the Court has often said that the rules will be disregarded only in the most exceptional cases, they do "not limit our power to decide important questions not raised by the parties. The

rule has certain well recognized exceptions, particularly in cases arising in federal courts." Vance v. Terrazas, 444 U.S. 252, at 258, note 5 (1980); and United States v. Arnold, Schwinn & Co., 388 U.S. 365, at 371, note 4 (1967). Although these two issues were not raised in the appeals court, this Court is not precluded from deciding this important matter in all fairness to the debtor, so as to provide the protection intended as part of the Bankruptcy laws.

The issue of the effect of the bankruptcy stay has previously been allowed when raised for the first time on appeal. Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, at 447-448 (11th Cir. 1982).

REASONS FOR GRANTING WRIT OF CERTIORARI

1. WHAT IS THE APPLICABLE LAW, OF THE EFFECT OF BANKRUPTCY RULE 6009 AND AS TO THE EFFECT OF PROCEEDING WITH LITIGATION AGAINST A BANKRUPT DEBTOR IN POSSESSION WITHOUT LIFTING OR MODIFYING THE AUTOMATIC STAY PROVIDED FOR DEBTOR'S PROTECTION UNDER 11 U.S.C. § 362(a) AS DECISIONS OF THE COURTS OF APPEALS ARE IN CONFLICT?

The ruling of this Court is required to resolve a number of inconsistent decisions concerning the effect of bankruptcy or more precisely, the automatic stay, on pending litigation. This is an often litigated subject and the conflicts in the decisions include differences in bankruptcy court, U.S. District Court, as well as U.S. Appeals Court rulings and with the Bankruptcy Rules adopted by this Court. What is supposed to be a uniform bankruptcy law is not being consistently interpreted, and the larger debtor entities could "forum shop."

The conflict concerns 11 U.S.C. § 362(a)(1) and (2), which in summary provides a debtor with an automatic stay of commencement or continuation of a judicial, administrative or other action or proceeding, or to recover a claim against the debtor upon filing for protection under the bankruptcy laws. As such, settling this issue by this Court is not only necessary for this petitioner, but also for the consistent administration of the bankruptcy laws so as to end the confusion, redundant procedure and the inconsistencies in present case law.

Reported decisions show us a spectrum of treatment ranging from the presumption, virtually without comment, that the litigation is unaffected by the bankruptcy, to the other extreme that all litigation involving the debtor is summarily and automatically suspended. Although

some of the cases which the petitioner shall cite, are admittedly not in its favor, they will show the need for settlement by this Court of this important bankruptcy question. This Court's decision at this time would restore uniformity to an otherwise unsettled and procedurally burdensome area of bankruptcy practice.

Under Title 11, U.S.C. §§ 101 et seq. (hereinafter referred to as the "Bankruptcy Code"), the effect of commencement of a bankruptcy case on the debtor's pending litigation involves consideration of different provisions provided by the Bankruptcy Code and the Bankruptcy Rules. They consist of Bankruptcy Code §§ 362(A) and Bankruptcy Rules 4001, 6009 and 9014, 9027. All these relevant provisions can be found in the Appendix, pp. A-1-34.

There are three general alternatives. Bankruptcy Rule 6009 establishes the ability of the debtor-in-possession or trustee to continue prosecution of the litigation that is in process with or without court approval. The Rule also allows the debtor-in-possession to enter an appearance and defend any pending action or proceeding by or against the debtor.

A second alternative is provided by Bankruptcy Rule 9027 which gives some form of flexibility in allowing removal of certain litigation to the bankruptcy court. Bankruptcy Rule 9027 implements Title 28, United States Code § 1452 of the Judicial Code, § 1452 provides the basis for the bankruptcy court to assume jurisdiction over impending civil action, if the threshold requirements for jurisdiction are present. The

specific limitations of bankruptcy court jurisdiction over civil actions are not pertinent to this writ.[1]

The third alternative is the automatic stay. The policy and purpose of the automatic stay is set forth in the legislative history of §362. The history provides the following:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, ... and foreclosure actions.... Subsection (A) defines the scope of the automatic stay by listing the acts that are stayed by the commencement of the case. (Emphasis added.)

H.R. Rep. No. 95-595, at 340, 95th Cong. 1st Sess. (1977).

Furthermore, in Matter of Johns-Manville Corp., 26 B.R. 405 (B.Ct.N.Y. 1983), the court held that "the scope

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1 See, 28 U.S.C. §§ 1334 and 157 for the bankruptcy court's jurisdiction over civil actions.

of the stay is narrowly focused on debtor protection only." Thus, the automatic stay allegedly prevents adverse parties from furthering pending litigation detrimental to the estate.

The leading case in this controversy is Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3rd Cir. 1982). This apparently was one of the first appeals court decisions on this subject. The litigation in U.S. District Court simply involved a dispute on a lease, both parties appealed. It was revealed in the appellate court for the first time that the Hotel had filed a chapter 11 bankruptcy case. In reviewing the statutory section, 11 U.S.C. § 362(a), and, in summary, the legislative history, the court, in quoting the House Report, states:

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of claims in preference to and to the detriment of other creditors ...

The court also stated:

Under the old Bankruptcy Act, a debtor apparently could waive a stay. Under the new Code, relief from a stay must be authorized by the Bankruptcy Court to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor. Because it is the bankruptcy judge who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization, it is essential that he make the determination as to whether an action against the debtor may proceed or whether the

> stay against such actions should remain in effect.

Id. at 448.

The court goes on to say:

> The statute does not address actions brought by the debtor which would inure to the benefit of the estate. The section does not indicate whether a stay becomes operative when the trial phase of a proceeding against the debtor has already concluded prior to the filing of the petition in bankruptcy, and the debtor or his adversary loses on appeal.

Id. at 448-449.

Although the "statute" says nothing on actions brought by the debtor, Bankruptcy Rule 6009 does and the court's conclusion is wrong as it is directly contrary to the Bankruptcy Rule.

In firm reliance on the bedrock foundations of purposes of the automatic stay, the court formulates guidelines for all seasons attempting to establish a set of rules to resolve

whether the stay is in effect or not in all cases of debtor litigation; however, it completely ignores Bankruptcy Rule 6009. The court held:

> In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.
>
> Under this test, the instant appeals, since they arise out of an eviction proceeding brought against the debtor Hotel, are subject to the automatic stay imposed by section 362. Since the Bankruptcy Court has not entered an order granting relief from the stay, we hold that section 362 prevents us from proceeding with this appeal.

Id. at 449.

Thus are all stay issues to be resolved.

The decision has had wide simplistic appeal among the circuits. However, the decisions are not consistent and the logic is flawed.

A. In Cathey v. Johns-Mansville Sales Corporation, 711 F.2d 60 (6th Cir. 1983), the court, in citing the St. Croix case stated that the automatic stay applied and that the debtor's status at the initial proceeding would be examined and since it was an action against the debtor under the St. Croix doctrine, the case and the appeal would be stayed, despite the fact that the debtor had taken the appeals. The court goes on to adopt the St. Croix doctrine that the bankruptcy court is the exclusive court to grant relief from the stay and so the appeals were stayed pending release by the bankruptcy court.

B. In In re UNR Industries, Inc., 23 B.R. 144 (B.Ct.Ill. 1982),

the non-debtor was attempting to have the stay modified so as to allow perfection of appeals to the Illinois Supreme Court. The bankruptcy court initially modified the stay to allow Manville to pursue its appeals, then vacated the order reimposing the stay in part on procedural grounds. However, the court did not adopt the broad ruling of St. Croix.

C. In re Ericson, 26 B.R. 973 (B.Ct.Ca. 1983), which involved a request for relief from stay so as to allow a pending divorce case to proceed, the court cited St. Croix in a footnote stating that the debtor's appeal was stayed, then the court lifted the stay so as to allow the debtor's own appeal to proceed. Although this procedure is consistent with the St. Croix doctrine it would be wholly unnecessary if Bankruptcy Rule 6009 were followed.

D. In the Marcus, Stowell and Beye Government Securities Inc. v. Jefferson Investment Corporation, 797 F.2d 227 (5th Cir. 1986) case, on learning of an appellant's bankruptcy the court in a footnote, stated in summary that "based on the persuasive holdings and reasoning contained" in Cathey and St. Croix (citing cases) the court found that the debtor's appeal was stayed. The court then disregarding St. Croix based upon the "identity of positions" by a non-debtor appellant allowed the appeals to proceed. The court gave lip service to St. Croix but then did not follow its persuasive reasoning.

E. In In re Brady, 35 B.R. 551 (B.Ct.Pa. 1983), the court went through the St. Croix doctrine analysis to reach its desired results finding that the debtor's action to

vacate a judgment against debtor was stayed because the "initial proceeding" was a claim by the creditor against the debtor. This case also ignores Bankruptcy Rule 6009.

F. In Commerzanstalt v. Telwide Systems, Inc., 790 F.2d 206 (2nd Cir. 1986), the debtor filed the bankruptcy during a pending appeal before that court. The court cited to St. Croix. Although the debtor was the appellant the action was stayed because the action in the lower court was brought against the debtor. The court held that relief from the automatic stay must be obtained in the bankruptcy court. Again, Bankruptcy Rule 6009 was not cited nor utilized. The court also made the rather curious statement that the appeal was indisputably a continuation of a judicial action or proceeding and was therefore automatically stayed if it was an

action against the debtor. Therefore, the appeals court stayed the appeal until the further action in the bankruptcy court was held even though the debtor was the appellant and wished to proceed with the appeal.

G. In re Holtkamp, 669 F.2d 505 (7th Cir. 1982), held that the stay would be lifted to allow a non-bankruptcy case to proceed. This court did not establish any sweeping guidelines as in the St. Croix case and was decided before St. Croix. This decision is in conflict with the St. Croix doctrine as it appears to have been decided on the bare facts of the particular case only.

H. Freeman v. Commissioner of Internal Revenue, 799 F.2d 1091 (5th Cir. 1986), the court in citing St. Croix held that the debtor's appeal from a decision of the tax court was "obviously the continuation of a

judicial proceeding," Id. at 1092, the question was whether this was a proceeding against the debtor. The court found that since the debtor initiated the proceedings the case was not stayed. This case also ignores Bankruptcy Rule 6009, which would have led to the same but more direct result, and 11 U.S.C. § 362(a)(8). This is yet another instance of the St. Croix doctrine going through overly complicated analysis.

Some of the courts citing to the St. Croix doctrine are: In re Augustus Court Associates, 43 B.R. 352 (B.Ct.Ed.Pa. 1984); In re Convention Masters, Inc., 46 B.R. 339 (B.Ct.Md. 1985); Clay v. Johns-Mansville Sales Corp., 722 F.2d at 1289 (6th Cir. 1984), wherein the appeals court stayed the debtor's own appeal; Jefferson-Ward Stores, Inc. v. Doody

Company, 48 Br. 276 (Dist.Ct.E.D.Pa. 1985); and Teachers Insurance and Annuity Association of America v. Butler, 803 F.2d 61 (2nd Cir. 1986), where the appellate court again stayed an appeal initiated by the debtor, since in applying the St. Croix doctrine the application of the stay is to be determined as of the original proceeding.

Petitioner, through counsel, has not found any case in which this Court has addressed this bankruptcy law issue on the effect of the automatic stay on pending litigation. This Court has addressed other stay issues but they appear not dispositive of this issue.

By way of example of one extreme case in this area is In re Critical Fork Coal Corporation, 18 B.R. 422 (B.Ct.Va. 1982) where the court held that the filing of a bankruptcy

> effectively stops any further action in proceedings involving the debtor pending in other courts, regardless of whether the debtor is plaintiff or defendant.

Id. at 424. This appears to be an extreme.

The petitioner notes that in none of the above appellate court cases is Bankruptcy Rule 6009 ever considered at all. It is certainly presumed that the Supreme Court in adopting this rule meant it to have some effect. However, if the rule is known to the parties it has not been cited and does not appear to have been considered by any of the appellate courts and most other courts since that rule could have solved most of these issues in a very straight-forward manner.

Several important issues raised in the St. Croix doctrine cases are: (1) why no one has paid any attention to Bankruptcy Rule 6009; (2) what is the

nature of an appeal within the Federal court system, is it a "continuation of a judicial proceeding" or a new proceeding; and (3) what is the effect if Bankruptcy Rule 6009 is utilized to allow the debtor-appellant to proceed with an appeal or litigation on the non-debtor party? Can the non-debtor assert counterclaims and defend itself or must it seek relief from the stay?

It is clear from these cases and from the issues presented that the St. Croix doctrine, although superficially appealing, fails to recognize Bankruptcy Rule 6009, has resulted in increased litigation by requiring even the debtor in certain instances to go back to the bankruptcy court to obtain relief from his own bankruptcy stay, and leads to some unusual if not outright bizarre results if applied strictly.

The petitioner requests the Court to resolve this apparent conflict among the circuits and in the application of appropriate bankruptcy law.

2. WHETHER THE ENTRY OF A JUDGMENT AWARDING $35,000,000 AND ORDER AUTHORIZING FORECLOSURE OF REAL AND PERSONAL PROPERTY WITHOUT SEEKING RELIEF FROM THE AUTOMATIC STAY IS A VIOLATION OF THE AUTOMATIC STAY, PURSUANT TO 11 U.S.C. § 362(a), SO AS TO RENDER JUDGMENT VOID?

If the court finds that the automatic stay is applicable to LILCO and as such has stayed the court litigation, then a violation of the stay should be held to render any judgment or order void. Violation of the automatic stay is a serious matter and should not be taken lightly. In fact, the Code specifically provides for recovery of damages under 11 U.S.C. § 362(h) for willful violations. Furthermore, willful violations are liberally construed in

favor of the debtor by bankruptcy courts even when there is no actual notice of the existence of the stay. In re Eisenberg, 3 C.B.C.2d 440 (B.Ct.N.Y. 1980).

The stay is effective upon the date of filing of the petition and formal service is not required. Id., at 447; also see, 2 Collier on Bankruptcy, ¶ 362.03. The automatic stay is as it suggests, "automatic." All proceedings against the debtor must be stayed upon filing of a petition for bankruptcy. In re Barksdale, 5 C.B.C.2d 1163 (B.Ct.Va 1981). The Supreme Court has assumed the nature of the stay to be "automatic" and has stated in its opinions that proceedings are stayed, "when they file a petition for reorganization under Chapter 11 of the Bankruptcy Code." Norwest Bank

Worthington v. Ahlers, 485 U.S. 197 (1988). It is virtually controverted that "the automatic stay arises without any act by the court but rather by virtue of the filing by the debtor." In re Powell & Son, Inc., 7 C.B.C.2d 145 (B.Ct.Mo. 1982).

Entry of a foreclosure judgment action violates the automatic stay and renders the foreclosure void and of no effect. In re Barksdale, 5 C.B.C.2d 1163 (B.Ct.Va. 1981), In re Mongiove, 9 B.R. 34 (B.Ct.Fla. 1980). Any litigation activity taken in violation of the automatic stay is void.[2]. In fact, "filing of a bankruptcy petition

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2 Eisenburg, supra, at 447; Kalf v. Fauerstein, 308 U.S. 433 (1940); Zestee Foods, Inc., v. Phillips Foods Corp., 536 F.2d 334 (10th Cir. 1976); Meyer v. Rowen, 181 F.2d 715, at 716 (10th Cir. 1950); In re Potts, 142 F.2d 883 (6th Cir. 1944); In re John Wheeler, 2 C.B.C.2d 980 (B.Ct.Ga. 1980); and also, see, 2 Collier on Bankruptcy, ¶ 362.11

is a caveat to all the world and in effect an attachment and judgment." Mueller v. Nugent, 184 U.S. 1, at 15 (1902).

More applicable to the case at bar is the In re Grover case. This case held:

> Where a state court enters a default judgment against a debtor and then, allowing a trial on a cross-complaint against the debtor to continue after the commencement of the debtor's Chapter 7 case, enters judgment on the cross-complaint against the debtor on the basis of evidence adduced in violation of the automatic stay of § 362(a)(1) of the Code, its judgment on the cross-complaint is void and cannot be related back to the time of the entry of the original default judgment.

In re Grover, 13 C.B.C.2d 257 (B.Ct.Colo. 1980).

> Hence, the findings that were made were without jurisdiction and are consequently void.

Id. at 259, as cited in Ben Gromet and Michael C. Myers v. Hawaii Mini-Storage

Systems, Inc., 1 C.B.C.2d 616 (B.Ct.Hawaii 1980). The Hawaii court went on to hold that all proceedings against the debtor and his property are automatically stayed and any action taken against the debtor's property is without the approval of the bankruptcy court and is null and void.

It has further been confirmed, through case law, that the automatic stay was intended to be "far reaching." In the Matter of R. S. Pinellas Motel Partnership, 1 C.B.C.2d 349 (B.Ct.Fla. 1979). In its opinion the court specifically stated:

> It is clear from the legislative history of § 362 that Congress intended the automatic protection to be afforded by the automatic stay to be far reaching and to eliminate the previously existing limited perimeters of the pre-Code automatic stay. This conclusion is further supported by an overriding policy aim of

> Chapter 11 of the Code which is to provide the broadest protection to debtors in general.

Id. at 356.
Most courts will even go further by holding that parties who "disobey the stay before it has been vacated or modified" are to be held in contempt. In re Johns-Mansville Corporation, 7 C.B.C. 1231 (B.Ct.N.Y. 1983).

Debtor, BRC, prays that the Writ of Certiorari be granted for the purpose of reviewing whether the judgment was entered in violation of the bankruptcy stay.

3. WHETHER THE PETITIONER IN SEEKING DAMAGES FOR BREACH OF CONTRACT WHICH HAD NOT BEEN TERMINATED, WAS WRONGFULLY DEPRIVED OF ITS RIGHT TO JURY TRIAL WHEN THERE WERE CLEAR QUESTIONS OF FACT AND WHICH IS A PURELY LEGAL REMEDY ENTITLING PETITIONER TO JURY TRIAL?

The trial court erred in removing the case from the jury by directing a verdict and dismissing all claims of BRC against LILCO. Tne court held

that the contracts in issue were not legally terminated, the task should then fall to the jury to determine the meaning of the parties' agreements, and what was and was not in conformity therewith. The jury had sufficient evidence to determine these matters from the evidence presented.

A district court can enter a directed verdict only where there is either "a complete absence of proof of an issue or issues material to the cause of action" or where "there are not controverted issues of fact upon which reasonable men could differ." Fed. R. Civ. P. 50(A); 5A Moore's Federal Practice, ¶ 50.02[1], at 50-20 (2nd Ed. 1982). Furthermore, directed verdicts "should be cautiously and sparingly granted." Black, Silvalls and Brison, Inc. v. Keystone Steel Fabricating, Inc., 584 F.2d 946, at

951 (10th Cir. 1978) and entered only where "the evidence points all one way." Martin v. Unit Rig and Equipment Company, Inc., 715 F.2d 1434, at 1438 (10th Cir. 1983). Evidence adduced must be viewed "in the light most favorable" to BRC and BRC is entitled to the "benefit of all inferences which the evidence fairly supports even though reasonable contrary inferences may be drawn."[3] Only when the facts and inferences, thus viewed, points so strongly that reasonable minds could not come to a different conclusion, can a directed verdict be entered. Id. at 865.[4]

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[3] See, New Mexico S & L Association v. United States Fidelity & Guaranty Co., 454 F.2d 328, at 331 (10th Cir. 1972); Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862, at 865 (10th Cir. 1986).

[4] Also, see, Dataq, Inc. v. Tokheim Corp., 736 F.2d 601, at 603 (10th Cir.

The court may not weigh evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury.[5] The directed verdict is reversible and the entire case must be remanded for a new jury trial because BRC presented sufficient evidence in support of its claims.

Under the Uniform Commercial Code ("UCC" § 55-1-200, et seq. N.M.S.A. 1978), the jury is to determine the meaning of the contracts and what acts of the parties are in accordance therewith. In light of the evidence of such extrinsic matters as conduct,

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(4 cont.) 1984); Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1983); Zilinger v. Uvalde Rock Asphalt Co., 316 F.2d 47 (10th Cir. 1963).]

5 Brady v. Southern Railroad Co., 320 U.S. 476, at 479 (1943); 9 Wright and Miller, Federal Practice and Procedure, Civil, § 2527, at 560 (1971); Continental Ore Company vs. Union Carbide & Carbon Corporation, 370 U.S. 690, at 700 (1962).

circumstances and backgrounds of the parties, and the trade usages and practices. N.M.S.A. § 55-1-205, 55-2-201(3) and 55-2-208 (1978); Amico Production Company v. Western Slope Gas Company, 754 F.2d 303, at 307 (10th Cir. 1985); Pennzoil v. Federal Energy Regulatory Commission, 645 F.2d 360, at 388 (5th Cir. 1981); Amerine National Corporation v. Denver Seed Company, 493 F.2d 1275, at 1278 (10th Cir. 1974). Between merchants, as is the case at bar, good faith is determined in light of "reasonable commercial standards of fair dealing in the trade." N.M.S.A. § 55-2-103(1)(b) (1978). These are questions of fact for the jury. Anderson on the Uniform Commercial Code (3rd Ed. § 1-201:95, at p. 237 (1981)).

While in the Bankruptcy Court, LILCO's first motion for summary

judgment was denied on the contract claim by order of December 9, 1985, which in part stated "With respect to the contract claim, however, issues of fact exist, and BRC should be accorded its day in court," and that significant factual issues were raised (Appendix, pp. A-70-83).

The court stated that the contracts were not terminated. "But, in fact, he stated to the jury that it's their [LILCO's] position that the contracts had never been terminated." And further the court in ruling on an objection stated:

> "There is no termination issue before the Court, Mr. Woolley"....Mr. Woolley, I addressed a similar objection going to terminate with Mr. Olmsted and Mr. Brannen. In Mr. Brannen's opening argument, he stated that they never considered the contract terminated and that's the position of both parties, so any question regarding any termination clause is irrelevant." (Emphasis added)

LILCO does not to this day, consider BRC to be in breach. LILCO admitted in opening statement that the contracts were not terminated. Counsel stated "But LILCO agreed with him that force majeure condition did exist and they didn't terminate the contract and they didn't declare a breach at that time ...", and also stated "because LILCO --- that's right, they had a right to terminate them and they didn't terminate them because they still want today, assured source of supply of uranium because all of the reactors have sure slowed down in terms of construction and there have been problems with that. They are eventually going to need the uranium and they don't want a Westinghouse." And later in a bench conference LILCO's counsel stated "We do not take the position that the contracts were terminated." Whether

BRC's conduct constituted a breach which barred BRC from recovering or whether LILCO breached and repudiated by refusing to accept and pay for tendered goods is a question for the jury.[6]

If the contract was not terminated why would BRC be precluded from a jury trial on a contract claim? Historically a suit on contract is a remedy in law and there is the right to a jury trial. 9 Wright and Miller, Federal Practice & Procedure: Civil, § 2302, at 13 (1983).

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6 See, Appliance Distributors v. Mercury Electric Corp., 202 F.2d 651 (10th Cir. 1953); Kroder v. Aurora, 223 Neb. 704, 393 N.W.2d 250 (1986); Joe Oil U.S.A., Inc. v. Consolidated Edison Company, 107 Misc.2d 376, 434 N.Y.S.2d 623 (1980); Leming v. Aid, 155 N.W.2d 384 (1967); Noreli Industries, Inc. v. Klenert's Inc., 57 A.D.2d 792, 394 N.Y.S.2d 687 (1977); and Roberson Steel Company v. Harrell, 177 F.2d 12 (10th Cir. 1949).

The jury should have been permitted to hear all evidence relating to these contracts in issue to determine the contract meaning and the conformity matters and to decide them.

The jury must further determine whether LILCO notified BRC it was in breach.[7]

The contracts give LILCO the right, "should it so chose to declare a material breach of that agreement....

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7 See, Gantry Construction Co., Inc. v. American Pipe and Construction Company, Inc., 49 Cal.App.3d 186, 122, Cal.Rptr. 834, at 837 (1975).; Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976); Full Circle Inc. v. Shelling, 108 I.D.A. 634, 701 P.2d 234 (1985); Roth Steel v. Sharon Steel Corporation, 705 F.2d 134, (6th Cir. 1983); Industrial Fiberglass v. Jandt, 361 N.W.2d 595 (N.Dak.Sup.Ct. 1985); Stamper Blackhills Gold Jewelry v. Souther, 414 N.W.2d 601 (1987); Armco Steel Corp. v. Issacson Structural Steel Company, 611 P.2d 507, at 510, Note 8 (1980); Southern Illinois Stone Company v. Universal Engineering, 592 F.2d 446 (8th Cir. 1979); Kopper Glo Fuel, Inc. v. Island Lake Coal Co., 436 F.Supp. 91 (E.D.Tenn.N.D. 1977).

LILCO has refrained from declaring BRC to be in material breach under this contract...." (emphasis added). BRC presented evidence that LILCO's overriding reason for rejecting BRC's tender was a change in market conditions and that LILCO simply did not need uranium.

Because uranium is very speculative, a failure to immediately notify the other of a breach under a speculative mineral contract must be considered by the jury in determining questions of waiver and estoppel.[8]

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8 See, New Mexico Uniform Jury Instruction, N.M.S.A. § 13-808 (1978); Miller v. Phoenix, Assur. Co. Ltd., 52 N.M. 68, 191 P.2d 1993 (1948); Kirkpatrick v. McMillan, 49 N.M. 100, 157 P.2d 772 (1945); Homestake Mining Company v. Midcontinent Exploration Co., 282 F.2d 787 (10th Cir. 1960). In the Homestake case, the court applied New Mexico law; Nelmes v. Miller, 56 N.M. 132, 241 P.2d 333 (1952); Patterson v. Hewitt, 11 N.N. 1, 66 P. 552 (1901).

Given LILCO's opening statement and other evidence that it had not terminated, the court below erred in taking this case from the jury and entering its finding that BRC was in breach. The issue is governed by Zelinger v. Uvalde Rock Asphalt Company, 316 F.2d 47 (10th Cir. 1963). There, events occurred entitling the nonbreaching party to terminate. However, there was evidence that the nonbreaching party sought to act promptly in declaring breach. In upholding the trial court's submission of the case to the jury, the Tenth Circuit Court had held:

> [A] party to a contract should promptly exercise a right to terminate a contract. This rule, however, is a rule of substantive law, not a rule of evidence. Whether the right to terminate has been exercised promptly is a question of fact to be determined by the jury under the standard of reasonableness. Id. at 53. (emphasis added)

Moreover, this court affirmed the following jury instruction as a correct statement of the law:

> You are instructed that a party who has a right to terminate a contract because of the default of another must act with a reasonable degree of promptness after knowing of such default. If it fails to do so, it waives the right to rescind for that cause. Id. at 53, Footnote 4.[9]

The only evidence before the jury showed that BRC's bankruptcy which was initiated by LILCO as the lead petitioning creditor did not prevent BRC from tendering, and that LILCO's payment for the tendered uranium would have ended the bankruptcy by providing sufficient funds to pay all other creditors in full plus interest, and most likely to eventually pay LILCO in

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[9] Accord, Brunswick-Balke-Collander Company v. Foster Boat Co., 141 F.2d 882, at 884 (6th Cir. 1944); Kirsh Novelty Company v. MidAtlantic Company, 158 F.2d 518 (4th Cir. 1946).

full as well. Now BRC has had to endure lengthy bankruptcy proceedings and some creditors have been paid 21% of their claims, while others have been paid nothing. Also, the stockholders have also been damaged as BRC remains in bankruptcy and the stock is virtually worthless. Moreover, it is a jury question whether LILCO's real reason for its rejecting was due to BRC's bankruptcy or because LILCO did not need or want the uranium at the time of BRC's tender. Sufficient evidence was presented to the jury to hold that LILCO actually lacked good faith. See, Big Horn Coal Company vs. Commonwealth Edison Company, 852 F.2d 1259 (10th Cir. 1988).

BRC's only significant source of income was LILCO's payment of deliveries to LILCO.

BRC clearly proved it was ready, willing and able to deliver the tendered uranium. Because the uranium did not have to come from the Marquez Mine, BRC was free to enter the open market which it did to meet its obligation.

At stake is a fundamental constitutional right. (VII Amendment to U.S. Constitution.) The guarantee of jury trial reflects "a profound judgment about the way in which a law should be enforced and justice administered." Duncan v. State of Louisiana, 391 U.S. 145 (1968). As John Marshall observed in McCulloch v. Maryland, 17 U.S. 316 (1819): "In considering this question, then, we must never forget it is a constitution we are expounding." As Justice White observed in the Duncan case, a right to jury trial is granted "in order to

prevent oppression by government." 391 U.S. at 155. As observed by the court in the Duncan case:

> Providing...the [litigant with a] right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, bias or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Id, at 156.

There is a strong federal policy favoring trial by jury of issues of fact. 9 Wright & Miller, Federal Practice and Procedure: Civil, § 2302, at 17 (1983). There is a strong policy toward finding a right to trial by jury in doubtful cases to insure constitutional rights. Beacon Theatres, Inc. v. Westover, 39 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Gefen v. U.S., 400 F.2d 476 (1968).

This Court has reversed an appeals court order denying a jury trial in a case concerning a dispute over an interest in a mineral royalty which was also a contract dispute. Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963).

In conclusion, as to the jury trial, only in the clearest of cases should a judge wrest from any party the constitutional protected right to trial by jury. This is not such a case. The claim involves a valid nonterminated contract concerning the sale of domestic uranium production, and BRC has demonstrated its entitlement to trial by jury and this matter should be remanded with sufficient guidance to the trial court to preclude any possible repetition of error on the jury trial and instruction phase of the new trial.

Respectfully submitted,

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AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

SECTION 362 (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15

U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of --

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that

arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay --

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant,

stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contact merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15)

of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this

title to obtain possession of such property; or [sic]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date

which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsection (d), (e), and (f) of this section --

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of

this section continues until the earliest of --

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time of a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section if --

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect

pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section --

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Bankruptcy Rule 4001

RELIEF FROM AUTOMATIC STAY;
USE OF CASH COLLATERAL;
OBTAINING CREDIT; AGREEMENTS

(a) Relief from Stay.

(1) Motion. A motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014.

(2) Final Hearing on Stay. The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced pursuant to § 362(e) unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued

pending conclusion of the final hearing.

(3) Ex Parte Relief from Stay. Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or

debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

(b) Use of Cash Collateral.

(1) Motion; Service. A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee

appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct.

(2) Hearing. The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(c) Obtaining Credit.

(1) Motion; Service. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Hearing. The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) Agreement Relating to Relief from the Automatic Stay, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion; Service. A motion for approval of an agreement to provide adequate protection, for the modification or termination of the stay provided for in § 362, for the use of cash collateral, or for approval of an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of lien senior or equal to the entity's lien or interest in such property shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed

pursuant to Rule 1007(d) and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Objection. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of the notice.

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection

is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

Bankruptcy Rule 6009

PROSECUTION AND DEFENSE
OF PROCEEDINGS BY TRUSTEE
OR DEBTOR IN POSSESSION

With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any

action or proceeding in behalf of the estate before any tribunal.

Bankruptcy Rule 9014

CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and compliant by Rule 7004, and, unless the court otherwise directs, the following rules shall

apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

Bankruptcy Rule 9027

REMOVAL

(a) Application.

(1) Where Filed; Form and Content. An application for removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The application shall be verified and contain a short and plain statement of the facts which entitle the applicant to remove and be accompanied by a copy of all process and pleadings.

(2) Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, an application for removal

may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code. If a case under the Code is pending when a claim or cause of action is asserted in another court, an application for removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting fortn the claim or cause of

action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) **Bond.** An application for removal, except when the applicant is the trustee, debtor, debtor in possession, or the United States shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all costs and disbursements incurred by reason of the removal should it be determined that the claim or cause of action was not removable or was improperly removed.

(c) **Notice.** Promptly after filing the application and the bond, if required, the application shall serve a copy of the application on all

parties to the removed claim or cause of action.

(d) **Filing in Non-bankruptcy Court.** Promptly after filing the application and bond, if any, the applicant shall file a copy of the application with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the application. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(e) **Remand.** A motion for remand of the removed claim or cause of action shall be filed with the clerk and served on the parties to the removed claim or cause of action. Unless the district court orders otherwise, a motion for remand shall

be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties. Within 10 days of being served with a copy of the report and recommendation, a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review by the district court of the report and recommendation shall be governed by Rule 9033.

(f) **Procedure After Removal.**

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether

served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the applicant to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(g) **Process After Removal.** If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom

process is served after removal of his right to move to remand the case.

(h) **Applicability of Part VII.** The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the Rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the

application for removal, whichever period is longest.

(i) [Abrogated]

(j) Record Supplied. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the bankruptcy court, and all process awarded, as if certified copies had been filed in the bankruptcy court.

(k) Attachment or Sequestration; Securities. When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

28 U.S.C. § 1452. Removal of claims related to bankrtupcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's policy or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a

decision to not remand, is not reviewable by appeal or otherwise.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: BOKUM RESOURCES CORPORATION,)
)
Debtor.)
)
)
----------)
)
BOKUM RESOURCES CORPORATION,)
)
Appellant,)
)
v.)
)
LONG ISLAND LIGHTING COMPANY,)
)
Appellee.)

No. 88-1948

ORDER

Before McKAY, SEYMOUR AND EBEL,
Circuit Judges.

This matter comes on for consideration of appellant's motion for leave to file its petition for rehearing out of time and the appellant's petition for rehearing.

Upon consideration whereof, the motion to file the petition for rehearing out of time is granted.

It is further ordered that the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BOKUM RESOURCES CORPORATION,	)
	)
Appellant,	)
	)
vs.	)
	)
LONG ISLAND LIGHTING COMPANY,	)
	)
Appellee.	)
	)

No. 88-1948

PETITION FOR REHEARING

Under Rule 40 of the Rules of the United States Court of Appeals for the Tenth Circuit, Appellant Bokum Resources Corporation ("BRC") hereby petitions the Court for a rehearing of its Order and Judgment (the "Opinion") entered herein on February 14, 1989. In support of this Petition, BRC states:

1. The Opinion affirms the orders and judgment of the trial court directing a verdict against BRC on its claims against Appellee Long Island

Lighting Company ("LILCO") and awarding judgment in favor of LILCO on its counterclaims against BRC because the trial court's findings in support of the counterclaims were not clearly erroneous -- specifically, that the trial court's findings that all uranium delivered under both the 1976 and 1978 supply contracts had to come from BRC's mine at Marquez, New Mexico, were supported by the substantial testimony of LILCO's witness Hugh P. Boylan;

2. The Opinion filed in the above-captioned cause on February 14, 1989, overlooks the critical fact that the trial court below did not and could not enter a finding that LILCO had declared BRC to be in material breach;

3. Absent a finding that LILCO declared BRC to be in material

breach, it is impossible as a matter of law and fact for the trial court's conclusion that BRC was in material breach to stand;

4. The Tenth Circuit has squarely ruled on this point in Zelinger v. Uvalde Rock Asphalt Company, 316 F.2d 47 (10th Cir. 1963). There, events occurred entitling the non-breaching party to terminate. However, the non-party failed to act promptly in declaring breach. Therefore, this Court held that a party who has a right to terminate a contract because of the default of another must act with a reasonable degree of promptness after knowing of such default. If it fails to do so it waives the right to assert for that cause;

5. Accordingly, BRC respectfully submits that this Court has overlooked

the absence of the essential finding that LILCO declared BRC to be in material breach. Absent such a finding the Trial Court's decision below and that of this Court entered February 14, 1989 should not stand.

Respectfully submitted,

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By /s/ Charles D. Olmsted
Charles D. Olmsted
ATTORNEYS FOR APPELLANT
BOKUM RESOURCES CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petition for Rehearing to be mailed to Jeffrey R. Brannen, Montgomery & Andrews, P.A., P. O. Box 2307, Santa Fe, NM 87504-2307, on this 28th day of February, 1989.

/s/ Charles D. Olmsted
Charles D. Olmsted

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOKUM RESOURCES CORPORATION,

Plaintiff-Appellant

v.

LONG ISLAND LIGHTING COMPANY,

Defendant-Appellee.

No. 88-1948
(D.C. No. 85-0859-JB)
(D. N.M.)

ORDER AND JUDGMENT

Before McKAY, SEYMOUR, and EBEL,
Circuit Judges.

This is a breach of contract case involving two uranium supply contracts. Under both contracts, plaintiff Bokum Resources Corporation ("Bokum") was the uranium seller and defendant Long Island Lighting Company ("LILCO") was

the buyer. Bokum appeals from the district court's directed verdict in favor of LILCO on Bokum's claims and from the district court's judgment, after a bench trial, in favor of LILCO on LILCO's counterclaims.

At oral argument on appeal, Bokum conceded that if the district court's findings of fact concerning LILCO's counterclaims were upheld, those findings would control Bokum's claims too as the law of the case. Bokum also conceded that our standard for reviewing the district court's factual findings concerning the counterclaims is the clearly erroneous standard. Fed. R. Civ. P. 52(a).

As the trier of fact for LILCO's counterclaims, the district court found that the uranium to be supplied under both of the contracts had to

come from Bokum's "property near Marquez, New Mexico . . . or, at Bokum's option, from other properties owned or controlled by Bokum." (Findings at 2, 5.) The district court concluded that Bokum had materially breached both contracts by "failing to timely deliver uranium from the Marquez property or any other properties owned or controlled by Bokum." (Findings at 8-9.)

Bokum argues that LILCO did not present sufficient evidence to support those findings. We disagree.

The principal issue is whether the 1976 contract required Bokum to supply uranium mined from its own property, or whether Bokum instead could purchase uranium on the spot market and resell it to LILCO. It is undisputed that the other contract, the 1978 contract, did require Bokum

to supply uranium from its own property. See Bokum Br. at 13. It is also undisputed that although Bokum eventually tendered uranium purchased on the spot market, Bokum never tendered or delivered any uranium mined from its own property.

We believe that the operative language of the 1976 contract, when viewed in context with the contract as a whole, is ambiguous. Therefore, it is proper to examine extrinsic evidence regarding the meaning of the contract.

The district court heard extrinsic evidence on the contract interpretation issue. LILCO's officer in charge of negotiating the 1976 contract testified that the purpose of the contract was to assure a stable source of uranium supply from a specific ore body:

> [H]aving gone through the Westinghouse situation, we wanted to be very sure that in order to meet our requirements that there was ore in the ground and that it could be mined on an economic basis and that in a couple of years we would be able to get the material.

(Tr. at 526-27.) He further testified that LILCO did not want to be at the mercy of the spot market, but rather wanted the uranium to "come from the Marquez Property, from the mine that would be developed on the property." (Id. at 532.) He testified that the relevant sections of the contract meant that Bokum was required to supply the uranium from its own property:

> Q. I'd like to ask you what the phrase, "or at seller's option from other properties located in the United States of America or elsewhere," refers to?
>
> . . . .

A. Well, the sentence starts off . . . by talking about, "shall be mined from deposited property under lease to seller." And to the best of our knowledge, the only properties that [Bokum] had at that time was the Marquez property and possibly the . . . adjacent property that was in litigation with Kerr-McGee.

But then we -- we were providing a million and a half dollars . . . for the development of other properties. And so if, as a result of using that money, and these people came up with uranium from other properties, whether it was in the U.S., in Mexico, Wyoming, Utah or Canada, we wanted to be able to buy the uranium from those properties. We wanted to have the first call on that uranium.

And that's what -- that's what is intended by that language.

(Id. at 536-37.)

Other language in the contract similarly supports the district court's interpretation. Bokum's failure to have a uranium mine on the

ore body premises in operation and production by June 1, 1978 (later extended to June 1, 1979) itself was defined in the 1976 contract as a "Material Breach." (Pl. Exh. B-1, Article 15.)

Based upon our review of the 1976 contract and LILCO's extrinsic evidence, and despite Bokum's presentation of contrary evidence (e.g., Pl. Exh. B-22), we conclude that the district court's finding were not clearly erroneous. Although uranium generally is a fungible commodity, the evidence supports the conclusion that LILCO contracted for a stable supply of uranium from specific properties. LILCO did not want, and did not contract for, a situation where Bokum could fulfill its obligations by purchasing uranium on

the spot market without developing a mine.

Because Bokum admittedly failed to tender or deliver uranium from the Marquez property or any other Bokum properties, the evidence supports the district court's rulings that Bokum had breached the contracts; that its tenders were non-conforming; and that LILCO's refusal to accept those tenders did not amount to a repudiation of the contracts by LILCO. Therefore, the district court properly entered judgment against Bokum on its claims and in favor of LILCO on LILCO's counterclaims.

The judgment of the district court is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:
Bokum Resources Corporation,
Debtor.
Reorganization No. 81-00666
Adversary Proceeding No. 82-0202-G

BOKUM RESOURCES CORPORATION,

Plaintiff,

v. Civil No. 85-0859-JB

LONG ISLAND LIGHTING COMPANY,

Defendant.

J U D G M E N T

THE COURT having entered its findings of fact and conclusions of law herein;

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff BOKUM RESOURCES CORPORATION shall take nothing by its Complaint;

2. Defendant LONG ISLAND LIGHTING COMPANY be, and it hereby is, awarded judgment against Bokum in the sum of $35,510,821.92, together with interest thereon at the statutory rate until paid, together with costs incurred herein; and

3. LILCO be, and it hereby is, entitled to foreclose on its security interest in the leases and the personal property under the 1976 Assignment of Leases and Security Agreement and the 1978 Assignment of Leases, Mortgage and Security Agreement.

DATED this 28th day of April, 1988.

/s/ Juan C. Burciaga
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

In re:
Bokum Resources Corporation,
Debtor.
Reorganization No. 81-00666
Adversary Proceeding No. 82-0202-G

BOKUM RESOURCES CORPORATION,

Plaintiff,

v. Civil No. 85-0859-JB

LONG ISLAND LIGHTING COMPANY,

Defendant.

COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THIS MATTER having come on for a jury trial on the merits, Plaintiff Bokum Resources Corporation ["Bokum"], by and through its attorneys, Stephenson, Carpenter, Crout & Olmsted, and Defendant Long Island Lighting Company ["LILCO"], by and through its attorneys, Montgomery and

Andrews, P.A., and following the close of Plaintiff's evidence, the Court having granted Defendant's motion for a directed verdict and the parties thereafter having stipulated that LILCO's counterclaim should be submitted to the Court, the parties having waived their right to a jury trial thereon, and the parties having submitted all matters on the counterclaim to the Court, including the parties' respective requested findings of fact and conclusions of law, and the Court having adduced evidence and being otherwise advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Bokum is a corporation duly organized and incorporated under the laws of the State of Delaware with its

office and principal place of business in the State of New Mexico.

2. LILCO is a corporation duly organized and incorporated under the laws of the State of New York with its office and principal place of business in the State of New York; that it is primarily engaged in the business of generating electricity and of providing electricity and gas to customers on Long Island, New York.

1976 UCPC

3. In order to fill its anticipated fuel requirements for planned nuclear electric engineering facilities, LILCO and Bokum entered into a contract on January 30, 1976, entitled "Uranium Concentrates Purchase Contract" ["1976 UCPC"] under which Bokum was to provide to LILCO five million pounds of uranium concentrates mined from Bokum's

property near Marquez, New Mexico ["the Marquez property"], or, at Bokum's option, from other properties owned or controlled by Bokum, said uranium concentrates to be delivered during the years 1978 through 1985.

4. Pursuant to Article 4 of the 1976 UCPC, LILCO deposited with Bokum the sum of $15 million as a purchase price security deposit.

5. Pursuant to Article 15 of the 1976 UCPC, certain defaults were enumerated including the failure of Bokum to have in operation and in production a uranium mine on the ore body premises on or before June 1978 and Bokum's failure to deliver specified quantities of uranium concentrates by certain dates; further, that Bokum would be in default if a receiver or trustee was appointed by court order and such

order remained in effect for more than sixty days or if a petition in bankruptcy was filed against Bokum.

6. In 1977, Bokum advised LILCO that the uranium ore reserves on the Marquez property exceeded the number of pounds needed to supply uranium to LILCO under the 1976 UCPC; that on April 7, 1978, LILCO exercised its right to purchase an amount of the uranium concentrate excess up to one million pounds over the amount provided in Article 3 of the 1976 UCPC.

7. Pursuant to Article 21 of the 1976 UCPC, monies due to either party under the contract which were not paid on or before the time specified, were to bear interest from the time due until paid at the rate of 2% over the prime rate as quoted by the Chase Manhattan Bank from time to time.

8. As security for the purchase price security deposit required under Article 4 of 1976 UCPC and, as security for Bokum's performance thereunder, Bokum duly made, executed and delivered to LILCO an Assignment of Leases and Security Agreement, dated January 30, 1976, which was duly and properly recorded.

9. By the terms of the 1976 Assignment of Leases and Security Agreement, Bokum granted to LILCO a security interest under Article 9 of the Uniform Commercial Code in and to all of Bokum's buildings or other structures, furnishings, stockpiled ore, furniture, Fixtures, mining and other equipment, articles of personal property located on or removed from the property covered by the Leases (except for ore removed) and all future additions thereto and

replacements or substitutions thereof, and in any personal property purchased with principal sums from the Escrow Account or Investment Account provided for in Article 4 of the 1976 UCPC ["the personal property"].

10. Pursuant to Article 4 of the 1976 UCPC, Bokum was to repay the purchase price security deposit by a credit of not less than $3 per pound on LILCO's purchases of the uranium concentrates.

11. Bokum did not on January 1, 1979, and does not at the present, have in operation and in production a uranium mine on the Marquez property.

12. As of August 1980, Bokum did not have the money or the means of obtaining the money necessary to complete the mine.

13. Bokum did not deliver any uranium concentrate to LILCO at any

time during 1979 or 1980 as required under the 1976 UCPC.

14. Bokum's failure to perform under the 1976 UCPC resulted in a substantial failure of consideration to LILCO.

15. Bokum has not cured or provided any assurance that it will promptly cure its defaults under the 1976 UCPC.

16. The parties have stipulated that the $15 million purchase price security deposit paid by LILCO to Bokum under the 1976 UCPC has not been repaid; that the accrued interest on this amount from December 31, 1981, at the rate of 2% over the prime rate as quoted by the Chase Manhattan Bank is $11,683,116.44.

1978 UCPC

17. On July 21, 1978, LILCO and Bokum entered into a second Uranium

Concentrates Purchase Contract ["1978 UCPC"] under which Bokum was to deliver four million pounds of uranium concentrate during the years 1986 through 1989 from Bokum's Marquez property or, at Bokum's option, from other properties owned or controlled by Bokum.

18. Pursuant to Appendix A, Section II of the 1978 UCPC, LILCO provided Bokum with a purchase price security deposit of $5 million.

19. Pursuant to Article 22 of the 1978 UCPC, any monies due by either party and not paid before the time specified were to bear interest from the time due until paid at the rate of 2% over the prime rate as quoted by the Chase Manhattan Bank from time to time.

20. When deliveries were made of uranium concentrates as required under

the 1978 UCPC, Bokum was to receive a credit of $5 per pound toward repayment of the purchase price security deposit.

21. Under the 1978 UCPC, Bokum agreed to put into operation a uranium production facility described in the Project Plan referred to in the Mine and Mill Development Financing Agreement between the parties, dated July 21, 1978, which was incorporated by reference in the 1978 UCPC.

22. As security for the 1978 UCPC purchase price security deposit and Bokum's performance, Bokum executed and delivered to LILCO an Assignment of Leases, Mortgage and Security Agreement, dated December 4, 1978, which was duly and properly recorded; that by its terms, Bokum granted to LILCO a security interest under Article 9 of the Uniform Commercial

Code in and to all buildings, structures, improvements, severed minerals, minerals extracted, stock piled ore, mineral inventory, furniture, fixtures, mining and other equipment (excluding milling equipment), and any other article of personal property, located, constructed upon, or affixed to the real property covered by the assigned Leases at the time of the execution of the Mining and Milling Agreement.

23. As of August 1980, Bokum was out of funds and without a means of obtaining funds with which to complete the mine on the Marquez property as required of the Mine and Mill Development Financing Agreement, dated July 21, 1978.

24. Bokum failed to deliver any uranium from the Marquez property or any other properties owned or

controlled by Bokum as required pursuant to the 1978 UCPC.

25. Bokum failed to complete the mine and mill on the Marquez property as required by the 1978 UCPC.

26. Bokum has demonstrated that it does not have the ability to complete the mine and mill and cannot deliver to LILCO the uranium concentrates required by the 1978 UCPC.

27. Bokum has not tendered delivery to LILCO of any uranium concentrates required under the 1978 UCPC; that its failure to do so has substantially impaired the value of that contract to LILCO.

28. Bokum's failure to perform under the 1978 UCPC resulted in a substantial failure of consideration to LILCO.

29. Bokum has not cured or provided adequate assurance that it

will promptly cure its defaults under the 1978 UCPC.

30. Bokum has not provided, and cannot provide, adequate assurance of future performance under the 1978 UCPC.

31. The parties have stipulated that the $5 million purchase price security deposit paid by LILCO to Bokum under the 1978 UCPC has not been repaid; that the interest computed from December 31, 1981, at a per annum rate at the Chase Manhattan prime rate plus 2% is $3,877,705.48.

32. On June 12, 1981, certain creditors, including LILCO, filed an involuntary petition in this court seeking reorganization of Bokum under Chapter 11 of the Bankruptcy Code and the petition was not dismissed within sixty days; that subsequently Bokum has been adjudicated bankrupt or insolvent.

33. On August 10, 1981, Bokum, for the first time, purported to tender to LILCO delivery of the uranium concentrates, well after the cure period for deliveries for the year 1979; that under this purported tender, Bokum sought to make deliveries of uranium concentrates which were not obtained from the Marquez property or other properties owned or controlled by Bokum; that the tender was rejected by LILCO as non-conforming and unacceptable under the terms proposed by Bokum.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter of, and the parties to, this action.

2. Bokum materially breached the 1976 UCPC by failing to put into operation by July 1978, a uranium mine

on the Marquez property as required by the contract.

3. Bokum materially breached the 1976 UCPC by failing to timely deliver uranium from the Marquez property or any other properties owned or controlled by Bokum as specified in the 1976 UCPC.

4. Bokum materially breached the 1976 UCPC by having a petition in bankruptcy filed against it and permitting the said petition to remain in effect more than sixty days.

5. Bokum materially breached the 1976 UCPC by being adjudicated bankrupt or insolvent.

6. By reason of Bokum's material defaults under the 1976 UCPC, Bokum is in default under the 1976 Assignment of Leases.

7. Bokum's material breaches of the 1976 UCPC substantially impaired

the value of that contract to LILCO and LILCO's obligations thereunder are discharged.

8. LILCO is entitled to recover the 1976 purchase price security deposit together with interest thereon as set forth in the 1976 UCPC.

9. Bokum materially breached the 1978 UCPC by failing to timely deliver uranium concentrates from the Marquez property or any other properties owned or controlled by Bokum as specified in the 1978 UCPC.

10. Bokum materially breached the 1978 UCPC by failing to complete the mine and mill on the Marquez property.

11. Bokum materially breached the 1978 UCPC by having a petition in bankruptcy filed against it and permitting the said petition to remain in effect more than sixty days.

12. Bokum materially breached the 1978 UCPC by being adjudicated bankrupt or insolvent.

13. Section III of Appendix A to the 1978 UCPC does not preclude recovery of interest on the 1978 purchase price security deposit as provided under Article 22 of the 1978 UCPC.

14. The $15 million 1976 purchase price security deposit is immediately due and payable to LILCO from Bokum together with interest thereon in the amount of $11,683,116.44.

15. The $5 million 1978 purchase price security deposit is immediately due and payable to LILCO from Bokum together with interest thereon in the amount of $3,877,705.48.

16. By reason of Bokum's material defaults under the 1978 UCPC, Bokum is in default under the 1978 Assignment

of Leases, Mortgage and Security Agreement.

17. LILCO is the holder of a valid lien and security interest in the leases and the personal property under the 1976 Assignment of Leases and Security Agreement, and the 1978 Assignment of Leases, Mortgage and Security Agreement.

18. LILCO is entitled to enforce its security interest under the 1976 Assignment of Leases and Security Agreement, and the 1978 Assignment of Leases, Mortgage and Security Agreement.

19. Bokum's letter of August 10, 1981, was not a conforming tender of its obligations under the 1976 UCPC; that LILCO's rejection of the said non-conforming tender was not a breach of the 1976 UCPC by LILCO.

20. LILCO is not barred from recovery herein by the doctrines of estoppel, waiver or laches.

/s/ Juan C. Burciaga
United States District Judge

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:	)
	)
BOKUM RESOURCES CORPORATION	)
	)
Debtor.	)
	)
BOKUM RESOURCES CORPORATION	)
	)
Plaintiff.	)
	)
vs.	)
LONG ISLAND LIGHTING COMPANY	)
	)
Defendant.	)
	)
LONG ISLAND LIGHTING COMPANY	)
	)
Plaintiff.	)
	)
vs.	)
	)
BOKUM RESOURCES CORPORATION	)
	)
Defendant.	)

Reorganization No. 81-00666
Adversary No. 82-0202
Adversary No. 82-0235

ORDER

THIS MATTER comes before the Court on the motion of Long Island Lighting Company (LILCO) for summary judgment against the Debtor, Bokum Resources

(BRC). There are two actions involved in this motion.

First, Case No. 82-0235 is a suit brought by LILCO in which it seeks to foreclose on mortgages which it holds on Debtor's properties. This Court's opinion of December 16, 1983 dismissed the Debtor's second, third, and fourth counterclaims to this action. Debtor's remaining counterclaim alleges that LILCO tortiously interfered with Debtor's prospective business opportunity. LILCO now requests summary judgment in its favor on this remaining counterclaim.

Second, Case No. 82-0202 is a contract action initiated by BRC, in which BRC claims that LILCO breached the contracts between the two by refusing to accept BRC's August, 1981 tender of delivery of uranium. LILCO moves for summary judgment dismissing

these claims and awarding the relief LILCO asked for in its counterclaims.

Oral argument was presented on October 18, 1985. In addition, briefs were submitted by the parties. Based upon the argument and the briefs, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

In August of 1973, LILCO approached Westinghouse Corporation and entered into an agreement wherein LILCO was to purchase uranium from Westinghouse. Westinghouse defaulted on this contract in 1975, leaving LILCO to seek alternative suppliers of uranium. In 1976, LILCO and BRC arrived at a Uranium Concentrates Purchase Contract under which LILCO was to buy uranium from BRC at a price below the then market price. This contract was amended on April 7, 1978,

by several other contracts. A $15,000.00 advance was made to BRC by LILCO pursuant to the 1976 contract. BRC used part of these funds to commence work on an uranium mine.

The project met with disaster in the form of floods in the mine shaft, and BRC was unable to deliver the uranium as scheduled under the contracts. BRC was excused from performance under the force majeur clause contained in the original 1976 contract, and the dates for delivery were extended one year by the 1978 agreements. An additional $45,000,000 was provided to BRC under a Mine and Mill Financing Agreement, entered into in 1978.

The project was still in trouble on 1979, whereupon BRC attempted to find a buyer for the corporation. These efforts did not meet with

success. One of the prospective buyers of BRC was Occidental Minerals (Oxymin). In 1980, BRC entered into a stock option contract with Oxymin. LILCO was involved in the negotiations between Oxymin and BRC, but the deal eventually fell through when Oxymin decided not to exercise its option. By this time BRC's future was in grave doubt, partly as a result of its own financial demise and partly as a result of the plummeting price of uranium following the Three Mile Island incident of March 28, 1979.

In 1981, LILCO foreclosed on the above-mentioned Financing Agreement, which had no force majeur provision. Nonetheless, the parties kept trying to work out the uranium purchase agreements. In 1981, BRC contacted Nuexco, a uranium broker. Based upon its discussions with Nuexco, BRC

eventually made a tender of performance to LILCO, which LILCO did not accept.

With regard to the contract action, LILCO contends that BRC had no right to demand performance, as BRC was in default and did not make a proper tender under the 1976 Uranium Concentrates Purchase Contract. LILCO states that BRC's tender was not compatible with the underlying intent of the parties to provide LILCO with a steady uranium supply, and that since BRC is insolvent, it cannot cure its defaults and assume the contract under 11 U.S.C. §365. It further alleges that BRC's tender was invalid because BRC had neither possession of the uranium nor the funds to purchase it.

BRC asserts that LILCO had also failed in its obligation under the 1976 and 1978 contracts. It points to

clauses limiting LILCO's remedies, included in the 1978 contract, which provide for simply termination in the event of material and specified breaches on the part of BRC. BRC states that failure to build the mine is a breach which falls under this provision, but that LILCO, for it's own reasons, failed to terminated the contract and should be awarded no further relief.

Respecting the counterclaim for tortious interference, LILCO urges dismissal, Relying on Anderson v. Dairyland Ins. Co., 97 N.M. 155, 637 P.2d 837 (1981). LILCO contends that, to prove such a claim, BRC must demonstrate that LILCO acted with an improper motive, using improper means, and that the deal would have succeeded without LILCO's interference. LILCO argues that the Oxymin contract was

conditioned upon successful renegotiations of the BRC/LILCO contracts, which was not accomplished. LILCO maintains that it used no wrongful means of negotiation, particularly no "predatory" means under the standard adopted in M. & M. Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, 612 P.2d 241 (1980).

BRC takes the position that LILCO's refusal to perform constituted tortious interference with the Oxymin contract. It states that the parties were in complete agreement "in principle", and that BRC would have received $40,000,000 but for LILCO's failure to cooperate.

CONCLUSIONS OF LAW

Bankruptcy Rule 7056 makes the summary judgment standards of FRCP 56 applicable to bankruptcy proceedings. Summary judgment is considered a

drastic remedy. Jones v. Nelson, 484 F.2d 1165, 1168 (10th Cir. 1973). Summary judgment may only enter where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Frito-Lay, Inc. v. Retail Clerks Union Local No. 7, 629 F.2d 653 (10th Cir. 1980). In considering a motion for summary judgment, the Court must look at the evidence in the light most favorable to the party opposing the motion. Lindley v. Amoco Production Co. , 639 F.2d 671 (10th Cir. 1981). The movant bears the burden of demonstrating his entitlement to judgment, as a matter of law, beyond all reasonable doubt. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980). Finally, while the Court may determine tne legal consequences of undisputed facts, it must deny a

motion for summary judgment if a triable issue of fact exists. Carpenters & Millwrights Health Benefit Trust Fund v. Domestic Insulation Co., 387 F. Supp. 144, 147 (D.C. Colo. 1975).

Under these stringent standards, I conclude that LILCO is entitled to summary judgment on BRC's counterclaim of tortious interference with a business opportunity. With respect to the contract claim, however, issues of fact exist, and BRC should be accorded its day in court.

This Court's opinion of December 16, 1983 held that LILCO did not economically coerce BRC and did not defraud BRC. There is no evidence that LILCO engaged in wrongful acts during the negotiations with Oxymin. More importantly, there is nothing to indicate such evidence will be

forthcoming in any trial. There is nothing in the record to support the existence of a disputed material fact which would support BRC's claim. A mere conclusionary allegation, without some support, is insufficient to overcome summary judgment. Bruce v. Martin Marietta Corp., 544 F.2d 442 (10th Cir. 1976); Shapiro v. America Home Assurance Co., 584 F. Supp. 1245 (D.C. Mass. 1984); Fosen v. United Technology Corp., 484 F. Supp. 490 (D.C. N.Y. 1980).

Using the standards set forth in Anderson, supra, which are applicable to this case, the facts would need to show wrongful intent and wrongful means in LILCO's actions. "Tortious interference requires a states of mind more capable than mere intent," in the usual tort sense; specific motive or purpose must be shown. Restatement

(Second) of Torts §766, Comment (1979). The undisputed facts shown that the negotiations were not successful, and that LILCO declined to make some concessions, but there is no indication of any wrongful conduct by LILCO. Mere failure to agree on certain points during the course of negotiations simply does not constitute interference with BRC's dealings with Oxymin. BRC thus cannot claim judgment as a matter of law. There being no controverted material facts, LILCO is entitled to summary judgment as to BRC's counterclaim of tortious interference.

BRC's breach of contract claim does not appear particularly strong from the evidence which has been presented thus far. However, the evidence raises significant issues of fact. BRC's exact financial position

and intent when making its tender of performance are unclear. In addition, clarification is needed as to whether LILCO had intended or specified that Bokum could not obtain the uranium called for under the contracts from another source. Further, the materiality of BRC's breach is in dispute, as well as the appropriate remedy for such breach. These are some of the factual issues remaining in dispute. Such issues require either further admissions and stipulations of fact by the parties, or an evidentiary hearing. Given the existence of these issues of fact, it is impossible to determine whether LILCO would be entitled to judgment as a matter of law. The breach of contract portion of the motion must, therefore, be denied.

Based upon the foregoing analysis, it is ordered that LILCO's summary judgment motion is granted with respect to BRC's counterclaim for tortious interference with a business opportunity, but is denied with respect to BRC's contract action. The parties shall bear their own costs and attorneys' fees regarding this motion.

IT IS SO ORDERED.

DATED: December _____, 1985.

BY THE COURT

/s/ JAY L. GUECK
JAY L. GUECK, JUDGE

BOKUM WHITE PAPER

(Reproduced only in part due to the length of the document; however, complete document is available to the Court upon request.)

THE 1976 BOKUM CONTRACT

In January, 1976, LILCO entered into a contract with Bokum Resources Corporation for the delivery of five million pounds of uranium concentrates, or "yellowcake," over the period of 1978 through 1985. At that time, with uranium selling for between $35-40 per pound on the open market, the prices specified in the contract were very attractive. The agreement called for LILCO to pay a firm price of $25.55 per pound in 1978, increasing to $40.40 per pound in 1985.

In return, LILCO provided BRC with $15 million as a security deposit against future delivery of the uranium. The contract specified that LILCO would get the money back through credits to be deducted from the delivered price of the concentrates.

The 1976 contract gave LILCO a grip on needed uranium supplies and gave BRC the money to build the mine. The contract included an option for LILCO to commit for an additional one million pounds of uranium at a later date.

LILCO negotiators insisted that a number of safeguards be built into the 1976 Bokum agreement. The contract said that BRC was obliged to deliver

the quantities specified, regardless of the source. BRC was legally bound to make up any shortfall from the proposed mine by purchasing uranium concentrates from other sources and selling them to LILCO at contract prices.

In addition, a provision of the 1976 agreement said that BRC could not use the "impracticability" provision of the Uniform Commercial Code that Westinghouse had attempted to use to get out of its contract. In view of the action by Westinghouse, and the fact that uranium prices were rising steadily, this provision was considered significant. As another safeguard, LILCO secured an Assignment of Leases and Security Agreement to assure LILCO of full possession of the mine site in the event of a default by BRC in the repayment of the security deposit or delivery of uranium. Finally, the contract gave LILCO first rights to negotiate additional uranium purchase contracts with BRC if additional ore reserves were found.

Bokum Resources Corporation

August 10, 1981

Mr. Thomas O'Brien
Senior Vice President - Finance
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Dear Tom:

Bokum Resources Corporation is prepared to deliver to you at Allied or Kerr-McGee's conversion plants the U_3O_8 called for in the agreement dated January, 1976 and the supplemental agreement dated April, 1978. The pounds and prices called for under these agreements, through August 31, 1981, are as follows:

Number of Pounds U_3O_8:	Delivery Year:	Price Per Pound U_3O_8:	Total Price:
500,000	1979	25.55	$12,775,000.00
600,000	1980	27.30	16,380,000.00
150,000	1980	29.15	4,372,500.00
550,000	Through August	29.15	16,032,500.00
83,334	31, 1981	31.05	2,587,520.70
1,883,334			$52,147,520.70

Bokum Resources Corporation would deliver the balance of the pounds called for in 1981, totalling 316,666 pounds, at a price of $31.05 per pound. These pounds would be delivered at a rate of 79,167 pounds per month.

The prices quoted above would be subject to a deduction for the Purchase Price Security Agreement. The contract provides for a deduction of $3.75 for the period involved in the first 800,000 pounds. Even though the reserves became such that the Purchase Price Security Deposit would reduce to $3.00 per pound, to avoid any conceivable disputes, we are agreeable to a $3.75 deduction for the first 800,000 pounds and $3.00 per pound for the other pounds mentioned above.

The cost to Bokum Resources Corporation to deliver the pounds, of course, is not subject to offset or other credit to LILCO.

We understand your conversion contracts are with Kerr-McGee. Would you please confirm that Kerr-McGee is the converter you have selected.

Very truly yours,

/s/ Richard D. Bokum

Richard D. Bokum II
President

RDBb

Long Island Lighting Company

September 3, 1981

Mr. Richard D. Bokum, II
President
Bokum Resources Corporation
P. O. Box 54-6277 - Surfside Station
1135 Kane Concourse
Miami, FLorida 33154

Dear Dick:

This will respond to the letter from Bokum Resources Corporation ("BRC") dated August 10, 1981, indicating that BRC is prepared to deliver the U_3O_8 called for in the agreement dated January 1976, as supplemented. As you know, the cure period for the deliveries for the year 1979 expired some time ago and the proposal would not in any way affect other circumstances now existing, including the failure by BRC to make the mine operational. These facts, among others, give LILCO the right, should it so choose, to declare a material breach of that agreement. Accordingly, BRC's proposal represents a proposed modification of, or novation designed to replace, the 1976 contract.

LILCO has refrained from declaring BRC to be in material breach under this contract to give BRC the opportunity to use its right to perform under the contract as part of the settlement of its debt to LILCO through negotiations with third parties. These negotiations have not been fruitful despite our efforts to help them succeed.

LILCO is willing to consider this new proposal of BRC's, but only under the clear understanding that LILCO reserves its right to set-off any money that LILCO would be obligated to pay BRC for the deliveries proposed in your August 10, 1981 letter against the debt BRC currently owes LILCO.

Even if the proposal were to develop into an agreement, it would not fully resolve the overall issue. Therefore, at the present time, LILCO believes it to be in the best interests of all concerned to achieve a resolution of these matters under the auspices of the Bankruptcy Court. Hence, we believe this proposal should be addressed as a part of a Chapter 11 Plan of Reorganization.

Very truly yours

/s/ Thomas O'Brien

THO'B:ab

Bokum Resources Corporation

September 16, 1981

Mr. Thomas O'Brien
Senior Vice President - Finance
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Dear Tom:

In response to your letter of September 3, 1981 BRC states that there has been no material breach of the 1976 concentrates agreement as supplemented. At Lilco's insistence the U_3O_8 can be delivered from anywhere in the world and has nothing to do with the mine being operational at Marquez.

BRC reaffirms that it is prepared to deliver the uranium called for under the 1976 agreement as supplemented, as stated in BRC's letter of August 10, 1981, including an additional 79,160 pounds for the month of September at $31.05 per pound. These deliveries are not subject to offset by Lilco as stated in your letter of September 3, 1981, except as defined under the 1976 agreement which is clearly spelled in BRC's August 10, 1981 letter. The contract provides for a deduction of $3.75 per pound for the period involved in the first 800,000 pounds, and $3.00 per pound thereafter.

We again call upon you to inform BRC where this material is to be sent so that BRC can fulfill its obligations

to Lilco under the 1976 agreement as supplemented.

Very truly yours,

/s/ Richard D. Bokum

Richard D. Bokum II
President

RDBb

Supreme Court, U.S.
JUL 20 1989

No. 88-2080

In The

Supreme Court of the United States

October Term, 1988

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF CASE

Respondent, Long Island Lighting Company (hereinafter referred to as "LILCO"), sets forth certain salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari. This case was commenced over seven years ago by Petitioner, Bokum Resources Corporation (hereinafter referred to either as "Petitioner" or as "BRC"), which was then, and still is, in bankruptcy. A Petition for Involuntary Reorganization was filed against Petitioner on June 12, 1981. At that time Petitioner had numerous unpaid creditors, many of whom had filed mechanics' and materialmen's liens against Petitioner's mining and milling properties. In addition, Petitioner was engaged in several lawsuits against contractors, stockholders and respondent.

Having no income and only two major assets, a uranium mill and mining leases which were pledged to LILCO, Petitioner filed a plan for reorganization on July 11, 1983 that was based on the outcome of its litigation. Thus, at the time of the trial of this case, Petitioner had already organized its affairs, several lawsuits or portions of lawsuits had been completed in Bankruptcy Court, the mechanics' and materialmen's liens had been resolved and the claims of all creditors, except for those of LILCO, had been settled or paid. Counterclaims brought against LILCO by Petitioner in another case had been decided in LILCO's favor and only two major pieces of litigation remained. One, this case, was a breach of contract action and the other was a mortgage foreclosure action, which has yet to be tried.

This petition involves only one lawsuit, not two, as Petitioner would have the Court believe. The complex procedural history surrounding the present case is not easily stated. An involuntary petition under Chapter 11 of the Bankruptcy Code was filed against Petitioner on June 12, 1981. Prior to the involuntary petition, controversies had arisen between Petitioner and LILCO as a result of LILCO's financing of Petitioner's mill and mine development project. As a result of these controversies, on November 10, 1980, LILCO commenced a mortgage foreclosure action against Petitioner in the United States District Court. Petitioner filed a counterclaim to the mortgage foreclosure action. When the involuntary petition was filed on June 12, 1981, the United States District Court stayed the mortgage foreclosure action. On June 29, 1982, the District Court entered an order removing the mortgage foreclosure pending before it, and all consolidated actions, to the Bankruptcy Court.

Subsequently, certain of Petitioner's counts in its counterclaim to the mortgage foreclosure action were tried before the Bankruptcy Court. These counts are not material to the pending petition. Later, the Bankruptcy Court granted summary judgment to LILCO on the remaining count in Petitioner's counterclaim and that issue was appealed to the District Court.

The case at bar is a breach of contracts case which arose involving two uranium concentrates purchase contracts (hereinafter referred to as the "1976 UCPC" and the "1978 UCPC"). The case was not pending at the time the Petition for Involuntary Reorganization was filed against Petitioner in June, 1981; rather, the original complaint was filed by Petitioner in February, 1982, in state court in

Cibola County, New Mexico, eight months after the commencement of bankruptcy. The case was removed to Bankruptcy Court on March 23, 1982. LILCO filed a timely answer in Bankruptcy Court. LILCO also responded to Petitioner's complaint with several compulsory counterclaims, one of which was for the return of $20,000,000 which had been advanced to Petitioner under the terms of the contracts which Petitioner had alleged were breached and another was for foreclosure of certain mining leases which had been pledged to LILCO as security for Petitioner's performance under the contracts.

Petitioner and its bankruptcy attorney were not unaware of the counterclaims brought by LILCO in this lawsuit. On April 12, 1982, a pretrial conference was held in Bankruptcy Court, and LILCO's counterclaims were discussed. However, Petitioner did not ask that the automatic stay be applied against the counterclaims at issue here. In 1985, Petitioner filed an amended complaint in the Bankruptcy Court; on August 5, 1985, LILCO filed an answer to the amended complaint and counterclaims and served Mr. Puccini, Petitioner's bankruptcy counsel, and Petitioner's litigation counsel. On August 27, 1985, Petitioner filed in Bankruptcy Court its reply to LILCO's counterclaims. Numerous pretrial hearings were held before the Bankruptcy Court in this case. At some of the pretrial hearings LILCO's counterclaims were discussed, yet at no time over the past seven years did counsel for Petitioner assert that the counterclaims should not proceed.

At a pretrial hearing held on April 14, 1984, the Bankruptcy Court determined that it would hear all pretrial issues and motions and that discovery would continue in the Bankruptcy Court. The Bankruptcy Court in May 1985 ruled that the case at bar was a non-core proceeding which should be tried by a jury in United States District Court for the District of New Mexico and recommended that the reference of the case be withdrawn. LILCO moved for summary judgment in September 1985, asking that the Bankruptcy Court dismiss Petitioner's breach of contracts case. This motion was denied. LILCO appealed that decision to the District Court.

Petitioner has stated that the mortgage foreclosure proceeding commenced by LILCO which had been pending at the time of the commencement of the BRC bankruptcy, *Long Island Lighting Co. v. Bokum Resources Corp.*, U.S. Bankruptcy Court for the District of New Mexico, Adversary No. 82-0235; D.N.M. CIV. No. 85-860, was consolidated and tried with the case at bar. This is an incorrect assertion. The trial court consolidated for appeal LILCO's appeal from the denial of its motion for summary judgment on Petitioner's breach of contract action and Petitioner's appeal of the granting of LILCO's motion for summary judgment on one count of Petitioner's counterclaim to LILCO's mortgage foreclosure proceeding which raised an issue that is no longer relevant to the proceedings at bar. Neither of these appeals before the District Court dealt with LILCO's counterclaim seeking foreclosure on the mining lease in response to Petitioner's allegation of breach of contract. Furthermore, the appeal itself did not involve the merits of LILCO's

mortgage foreclosure proceeding, but rather involved only one of Petitioner's counterclaims filed in response to LILCO's action for mortgage foreclosure. LILCO's mortgage foreclosure action is still pending before the Bankruptcy Court, has never been adjudicated and, contrary to the assertions made by Petitioner, was not tried with the case at bar.

Because the procedural history of this case is complex and confusing, we have included a Summary of Status prepared by Petitioner, BRC, for the Bankruptcy Court on April 18, 1986, as Appendix 1. The summary demonstrates that LILCO's mortgage foreclosure proceeding in Adversary No. 82-0235 was deferred until all other matters between LILCO and Petitioner were resolved. The counterclaim LILCO filed in response to Petitioner's complaint in the instant case is entirely different from LILCO's mortgage foreclosure proceeding and indeed does not even involve the same property.

Petitioner's third point relies on matters not of record and fails to inform this Court of critical procedural events. There is no evidence that had LILCO paid for tendered uranium that Petitioner could have gotten out of bankruptcy. Further, Petitioner omits the fact that it waived the jury's determination of fact regarding LILCO's counterclaim and agreed that the court could hear those claims as a trier of fact. Petitioner's waiver of the right to have the jury hear the counterclaim is the lynchpin in the Tenth Circuit's decision to affirm. As was admitted by Petitioner's counsel in the argument before the Tenth Circuit, if there was evidence to support the trial court's decision on the counterclaim, then the court's findings would control Petitioner's claims as well.

SUMMARY OF ARGUMENT

Point 1 responds to Petitioner's Questions 1 and 2 and makes the point that Petitioner has never previously raised an issue concerning the automatic stay. Point 1 further demonstrates that where a counterclaim is filed in the bankruptcy proceedings in response to a suit brought by the debtor, the automatic stay does not bar trial of the counterclaim. Further, where the bankruptcy judge and the District Court which tried the case are both fully familiar with the proceedings and where there is no harm to the interests of creditors and the debtor which the automatic stay seeks to protect, the automatic stay should not be used after the fact to upset a judgment. Finally, Point 1 demonstrates that there is no basis for granting the writ because the cases on which Petitioner relies to show a conflict have no bearing on the case at bar.

Point 2 responds to Petitioner's Question 3 and demonstrates that the question presented is not the sort that justifies issuing a writ of certiorari. The issue does not involve a conflict among the circuits nor an important issue of federal law. The issue is a routine procedural matter – a directed verdict – in a routine contracts case. Furthermore, the Petitioner's waiver of the jury on the counterclaim leads to the position that if the findings are not clearly erroneous, then the findings are law of the case and Petitioner cannot submit claims to a jury which would necessarily result in conflicting determinations if the jury found in his favor.

ARGUMENT

1. No writ should issue where Petitioner has failed to raise an issue concerning the automatic stay in any prior proceedings and where the counterclaims were filed in the bankruptcy proceedings so that the automatic stay does not preclude trial of the counterclaims with Petitioner's breach of contract claims which arose out of the same transactions. (Response to Questions 1 and 2)

Petitioner candidly admits that the first two questions presented have never been raised before. Not once during pretrial proceedings before the Bankruptcy Court nor during the trial of this case before the District Court did Petitioner suggest that proceeding to hear the counterclaims would be a violation of the automatic stay provisions. Never in the Court of Appeals – not in its brief, reply brief, oral argument or petition for rehearing – did the Petitioner mention the issues raised in its first two questions. Petitioner's previous silence, in and of itself, should lead this Court to refuse to issue the writ.

On numerous occasions this Court has observed that where the grounds presented in this Court have not been raised below, this Court will consider such grounds only in "exceptional" cases. *See, e.g., Heckler v. Campbell,* 461 U.S. 458 (1983). The "normal practice" of this Court is "to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority,* 476 U.S. 19, 24 (1986). There is no reason to refrain from the normal preservation requirements in the present case.

While there is not much authority dealing with the need to raise below an issue concerning a stay, what authority there is states that issues should be presented to

the Bankruptcy Court, the District Court, and to the Appellate Court. *See First Nat'l Bank of Denver v. Turley*, 705 F.2d 1024, 1026 (8th Cir. 1983).

No miscarriage of justice will arise if the normal practice is followed in this case. The record below makes it clear that the bankruptcy judge and the district judge were well aware of the proceedings in bankruptcy. Both judges realized that the counterclaims would be tried. The purpose of the automatic stay is "to protect the debtor and his creditors by allowing the debtor to organize his affairs, and by ensuring that the bankruptcy procedure may operate to provide an orderly resolution of all claims." *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). *See also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (1986). The bankruptcy judge suggested that reference of this case should be withdrawn so that the District Court could try the matter. The bankruptcy judge made the suggestion after full consideration of all pretrial matters, including summary judgment motions. The District Court which originally referred the claims to the Bankruptcy Court had complete familiarity with the entire scope of the proceedings before the bankruptcy judge. Thus, orderly resolution of the bankruptcy proceedings was not diminished by permitting the counterclaims to proceed. Permitting trial of the counterclaims did not hurt creditors because, apart from LILCO, there are no creditors of any magnitude. Finally, the debtor's own failure, during the seven years the matter has been pending, to raise an issue concerning the stay demonstrates the lack of harm to it.

The futility of Petitioner's position is further demonstrated by the result which would follow from granting

Petitioner relief. Lifting an automatic stay can be accomplished retroactively. *See In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984). Thus a remand from this Court to the very court which directed that the counterclaims be tried would result in nothing more than a lifting of the stay retroactively. There simply is no prejudice to the debtor where the creditor would have obtained relief from the stay had it been requested. *See In re Charter Co.*, 86 Bankr. 280, 283 (Bankr. M.D. Fla. 1988). Not only was the very judge who would have decided whether to lift the stay the judge who sent the counterclaims to the District Court for trial, but also all the considerations which militate in favor of lifting the stay were present. Thus "[w]here neither prejudice to the bankruptcy estate nor interference with the bankruptcy proceeding is demonstrated," the stay should be lifted. *In re Larkham*, 31 Bankr. 273, 276 (Bankr. D. Vt. 1983). Neither prejudice to the estate nor interference with the proceeding resulted from trying the counterclaims in the case at bar.

None of the cases cited by Petitioner stand for the proposition that a debtor should be allowed to participate in proceedings in the Bankruptcy Court, in the District Court and in the Court of Appeals without ever mentioning the automatic stay and then claim error for the first time in a petition for writ of certiorari. None of the cases cited by Petitioner even deal with comparable factual circumstances. In each case cited, the debtor had litigation pending against it at the time it filed bankruptcy and the issue was what effect the automatic stay provisions would have on the already commenced litigation. Cases like *Association of St. Croix Condominium Owners v. St.*

Croix Hotel Corp., 682 F.2d 446 (3d Cir. 1982), which recognized that an appellate court could *sua-sponte* consider the impact of automatic stay provisions on an appeal of an action originally brought against a debtor, have nothing to do with the present case. In *St. Croix* the bankruptcy proceedings were initiated after the trial was completed but before the appeal was finalized.

In the present case, unlike *St. Croix*, the bankruptcy proceedings were begun some eight months prior to the debtor's filing a breach of contract claim in state court. LILCO removed the case to the United States District Court which referred the matter to Bankruptcy Court, and therein LILCO filed its counterclaims which arose out of the same transactions which were the subject of claims brought by, not against, Petitioner. This case is procedurally distinguishable from *St. Croix* and is comparable to *In re American Spinning Mills, Inc.*, 43 Bankr. 365 (Bankr. E.D. Pa. 1984), wherein the court noted that a "stay implicitly does not bar a party from commencing an adversary or contested proceeding against the debtor under the caption of the bankruptcy case in the court where the petition is pending." *Id.* at 367. As *American Spinning Mills* stated:

> Since the case at bench was removed from state court to this court, a creditor may file a counterclaim here against the debtor without requesting relief from the automatic stay . . . .

Id.

It should be noted that regardless of what this Court does with respect to the questions presented in Petitioner's Questions 1 and 2, the judgment against Petitioner on its contract claims should stand. The automatic

stay provisions under Section 362(a) provide that entities may not proceed against a debtor once a petition has been filed, 11 U.S.C. § 362 (1982 & Supp. V 1987). Bankruptcy Rule 6009, however, permits a debtor to commence an action while under the protection of the automatic stay. Bankr. R. Proc. 6009. Therefore, Petitioner's action on its breach of contract claim properly proceeded to judgment regardless of the automatic stay; the judgment on those claims against BRC should stand.

In the present case, the debtor is using the stay provisions as a belated, last-ditch effort to avoid adjudication of its breach of contract. Such an offensive use of the automatic stay places the "debtor . . . in the position of assailant rather than victim, [and] the potential for abuse . . . is manifest." *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1168 (2d Cir. 1979). This Court should not countenance such abuse by issuing a writ of certiorari.

Petitioner has attempted to manufacture reasons for this Court to grant a writ. As Respondent has demonstrated, the cases on which Petitioner relies to assert a conflict in the circuits have no bearing on the case at bar. Further, there is no need for this Court to settle a question of law as requested by Petitioner because the rules cited by Petitioner have no application under the circumstances present in the case before the Court. For these reasons, the writ should not issue.

2. **The procedural ruling of a directed verdict on contract claims is an inappropriate issue for a writ, particularly when the findings on the counterclaim bar Petitioner's recovery. (Response to Question 3)**

Petitioner's third question fails to demonstrate that any grounds exist for issuing the writ. Petitioner's claim

is one which has no value to anyone other than Petitioner. The third question presented by Petitioner does not involve a conflict between the circuits or between state and federal courts. The issue presented does not involve a question of federal law which this Court should decide. The third question presented deals with a garden variety breach of contract claim and involves a routine procedural ruling on a motion for directed verdict.

Conspicuously missing from the petition is any mention of the parties' stipulation that LILCO's counterclaim be submitted to the trial court for determination. Nonetheless, the Tenth Circuit held that because of that action, if the findings were not clearly erroneous, then the findings would bar reconsideration of Petitioner's claims.

The District Court's findings on LILCO's counterclaims should not be overturned unless there is "the definite and firm conviction that a mistake has been made. . . ." *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 412 (10th Cir. 1984). The evidence in support of the trial court's findings and conclusions is overwhelming, and they have not been challenged in this petition.

What the court below held, and what Petitioner conceded, was that if the District Court's findings of fact were upheld, using the clearly erroneous standard, they would control Petitioner's claims too as the law of the case. *See also McGhee v. Draper*, 639 F.2d 639 (10th Cir. 1981); *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (Ct. App.), *rev'd on other grounds*, 92 N.M. 396, 589 P.2d 180 (1978); 1B J. Moore, *Moore's Federal Practice*, § 0.404 [1] (2d Ed. 1988). Petitioner agreed to submit the counterclaims

to the court for a decision and is bound by the findings and conclusions thereon which were upheld on appeal and not challenged in the petition before this Court. Any future jury verdict in favor of the Petitioner on its claims against LILCO would necessarily be wholly inconsistent with the trial court's findings and conclusions regarding Petitioner's material breaches and inability to perform either the 1976 UCPC or 1978 UCPC.

Petitioner claims that LILCO breached the 1976 UCPC by failing to accept BRC's purported tender of August 10, 1981. In order for Petitioner to prevail on this claim, the jury would have to decide that Petitioner's tender was conforming and that Petitioner was not in material breach of the 1976 UCPC and could therefore demand that LILCO perform. Such findings by the jury would directly contradict the court's findings and conclusions entered on April 28, 1988.

Petitioner further argues that LILCO's rejection of Petitioner's purported tender amounted to an anticipatory repudiation of the remaining provisions of the 1976 UCPC and the 1978 UCPC. In order to find in Petitioner's favor on these claims, the jury would have to find that Petitioner was not in material breach of either the 1976 or 1978 UCPC; that LILCO's rejection of the August 10, 1981 purported tender substantially impaired the value of the contracts to Petitioner; that Petitioner requested adequate assurances of performance from LILCO; and that Petitioner intended to perform and was ready and able to perform. Again, a verdict based on such findings would be directly inconsistent with the trial court's findings and conclusions.

Any future verdict in favor of Petitioner on its claims against LILCO would directly contradict the trial court's findings and conclusions, which, since upheld, became law of the case. LILCO should not be made to run the risk of inconsistent determinations which is the precise jeopardy it faces if the case is remanded for a jury determination on any of Petitioner's claims after the court's findings and conclusions on the counterclaims have been upheld. Petitioner having stipulated to the submittal of the counterclaims and its encompassing issues to the court, and having failed to challenge the validity of those findings and facts and conclusions of law in its petition, cannot now be heard to seek a jury trial of the same issues.

With no issue of federal law and no conflict among the circuits, Petitioner has failed to establish an appropriate reason for issuing a writ in this claim. However, even if the Court was to consider Petitioner's claims, the inevitable conclusion is that Petitioner is bound by the trial court's findings of fact and conclusions of law on LILCO's counterclaim which Petitioner agreed to submit to the Court for determination. For these reasons, the writ should be denied.

CONCLUSION

For the reasons given above Petitioner has failed to present a case in which it would be appropriate to issue a writ. There are no conflicting circuit court decisions which deal with similar factual circumstances. The case does not involve important issues of federal law on which this Court should rule; the Court should deny the petition.

Respectfully submitted,

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APPENDIX 1

BOKUM RESOURCES CORPORATION
LONG ISLAND LIGHTING COMPANY
SUMMARY OF STATUS

This report summarizes the status of matters pending before the United States District Court for the District of New Mexico and the Bankruptcy Court for the District of New Mexico. An involuntary petition was filed under Chapter 11 on June 12, 1981. Bokum Resources Corporation presented a plan of arrangement on July 11, 1983. After modifications and hearings, this plan was approved, and, in general, has been completed. Under the plan, creditors were allowed to select whether to participate in cash distributions or participate in the recoveries, if any, from certain claims being pursued by Bokum Resources Corporation against others, including Long Island Lighting Company.

ADVERSARY PROCEEDING NO. 82-0202

Bokum Resources Corporation filed an action for damages for breach of certain agreements relating, among other things, to the delivery of uranium concentrates from Bokum Resources to Long Island Lighting. This case was filed in the District Court, McKinley County, New Mexico, on February 19, 1982.

This case was removed to the United States District Court by Long Island Lighting, and subsequently transferred to the Bankruptcy Court. Bokum Resources Corporation contended this was a non-core proceeding, and should be tried by a jury in the United States District Court. Judge Gueck agreed with Bokum Resources Corporation, and this case is pending before Judge Burciaga

in the United States District Court awaiting a jury trial, as District Court No. 85-860 JB. Long Island Lighting did not appeal the point that this was a non-core action which should be tried by the Federal District Court before a jury.

Long Island Lighting sought summary judgment on this case before Judge Gueck. He denied summary judgment. Long Island Lighting has sought to appeal the denial of summary judgment to Judge Burciaga. While not conceding a Bankruptcy Judge would be able to grant summary judgment in a non-core jury case, Bokum Resources has responded to this appeal by showing the appeal was not timely or specific as required by Local Rule 31(g). In any event, this entire matter is before Judge Burciaga in the United States District Court.

COUNT I OF COUNTERCLAIM ADVERSARY PROCEEDING NO. 82-0235

Long Island Lighting filed a foreclosure action against Bokum Resources in 1980, and Bokum Resources filed a counterclaim consisting of four counts. It was determined to resolve the counterclaim before the complaint. The case was originally in the United States District Court for the District of New Mexico, but removed to Bankruptcy Court.

Count I of the Counterclaim involves a claim that Long Island Lighting Company interfered with, and breached fidiciary duties owed Bokum Resources in connection with, agreements between Bokum Resources and a third party.

Judge Gueck determined this was a non-core case which was to be tried by a jury before Judge Burciaga in the United States District Court. Long Island Lighting did not appeal this question.

Long Island Lighting sought summary judgment, and Judge Gueck recommended that summary judgment should be granted to Long Island Lighting on Count I of the Counterclaim. Bokum Resources timely appealed this recommendation to Judge Burciaga. The resolution of this matter is pending before Judge Burciaga in the United States District Court as District Court No. 85-860 JB, and there appears to be nothing further for the Bankruptcy Court as to this matter.

COUNTS II, III AND IV OF COUNTERCLAIM ADVERSARY PROCEEDING NO. 82-0235

By stipulation, Counts II, III, and IV of the Counterclaim were tried before Judge Gueck without a jury. Judge Gueck determined these issues in favor of Long Island Lighting. Bokum Resources appealed to the United States District Court.

District Court Judge Burciaga remanded this action to Bankruptcy Court for certain determinations as to the standard of review on appeal by order dated February 4, 1985. A copy of Judge Burciaga's Order is attached. At a pretrial hearing, Judge Gueck requested that both parties submit their positions by letter by November 1, 1985. Bokum Resources submitted its position by letter dated November 1, 1985. A copy is attached. Bokum Resources has not received a letter from Long Island Lighting with

regard to this matter. Judge Burciaga's request is pending before the Bankruptcy Court.

FORECLOSURE ACTION
ADVERSARY PROCEEDING NO. 82-0235

This claim by Long Island Lighting against Bokum Resources was deferred until the claims by Bokum Resources against Long Island Lighting are determined. It is now in the Bankruptcy Court.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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BOKUM RESOURCES CORPORATION,

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PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

The petitioner reluctantly files this Reply Brief so as to correct certain misrepresentations made by LILCO in its Brief in Opposition. The statements set out in the petitioner's statement of the case are accurate statements and not set forth to be misleading. The respondent correctly states that the procedural history of

ne present case is complex. etitioner's counsel did not represent RC in this matter until this appeal as taken. Nonetheless, due to the omplexity of this case and the fact hat petitioner's counsel was not nvolved in the litigation of this atter in lower courts, counsel has onsulted with the client and horoughly reviewed the record so as o assure the accuracy of the epresentations to the best of ounsel's ability.

REPLY TO THE RESPONDENT'S STATEMENT OF CASE

LILCO admits that BRC has been and till is in bankruptcy since June 5, 981. To date, the Plan has not been ompleted. Contrary to representations f LILCO, BRC filed its Second Amended lan of Reorganization on January 27, 984, and an order was entered

confirming the Second Amended Plan on August 15, 1984. (Note: This date was erroneously given as 1985 by petitioner on page 15 in its original petition). Due to the circumstances of this debtor, the Court issued an unusual confirmation order which retained jurisdiction so as to administer the estate further in accordance with the Plan "until a final order closing this estate is entered". In accordance with the Plan, over two million dollars has been collected and disbursed to some creditors including LILCO.

Contrary to LILCO's representations, all of the creditors have not been paid, and LILCO is not the only remaining creditor. Respondent has incorrectly stated that "[p]ermitting trial of the counterclaims did not hurt creditors because, apart from LILCO, there are no creditors of any

agnitude." It is important to note hat BRC still has a reasonably large umber of other creditors. BRC, in act, still owes substantial amounts in utstanding debts to these as well as ther creditors. In part, this is why RC is pursuing its claim. BRC would ot have remained in bankruptcy had ILCO paid BRC in 1981 when the tender f uranium was made. BRC would have had successful reorganization had LILCO ot breached its contract. Furthermore, f BRC prevails in this action against ILCO, BRC will be able to pay its total debt to LILCO including the stipulated judgment involved in this case (which was not contested). However, it should be noted that the indebtedness to LILCO was to have been repaid by credits to LILCO from payments made to BRC for uranium purchases.

LILCO incorrectly states that BRC

had no income other than monies provided by LILCO, when in fact, BRC did have other sources of income both before and after the filing of the bankruptcy petition. The respondent alleges in its response that the mortgage foreclosure was stayed in lower court. However, on page two of the respondent's brief, LILCO admits that certain claims were tried before the Bankruptcy Court. Despite the tortured history, a foreclosure order was entered by the U.S. District Court and can be found in the Petition in the Appendix at page A-49. Said order was issued without any motion being filed or order entered modifying the automatic stay, and without any notice to the other lienholders having liens on the same property as LILCO.

LILCO filed suit in the United States District Court for the District

of New Mexico, Case No. CV-80-912HB, against BRC in a foreclosure proceeding on November 10, 1980. On June 12, 1981, LILCO and others filed an involuntary Chapter 11 petition against BRC and an order for relief was entered December 17, 1981. As such, the foreclosure proceeding was filed before the involuntary petition was filed.

REPLY TO POINT ONE

Pursuant to Case Law the Issue Regarding the Violation of the Automatic Stay can be Raised at Any Point of Litigation

The automatic stay has never been lifted so as to allow LILCO to proceed with the mortgage foreclosure. The issue of modifying the automatic stay was never raised in lower court, but the petitioner has never alleged that the issue was raised. In fact, petitioner has cited to various cases which would permit the action to be heard by this Court despite the failure of that issue

being raised in lower court.

11 U.S.C. Section 362 provides protection to the debtor through the automatic stay provision. The purpose of the automatic stay is not only to protect the debtor and its assets, but also to provide protection to the other creditors that an orderly disposition of assets is occurring rather than having the debtor dismembered by a frenzied shark-like attack. Because LILCO has violated the automatic stay, the Court should hold that the lower Court's decision should be set aside.

The failure to raise the issue of violation of the automatic stay in the lower court only magnifies the harm caused to the various secured and unsecured creditors, stockholders and the debtor for which the statute provides protection. The respondent provides on page nine (9), of their

Brief in Opposition, the manner in which they believe the automatic stay should be lifted. Cases are cited by the respondent which provide for the automatic stay to be lifted retroactively. These cites and arguments along with the cites in the Petition for Writ of Certiorari clearly demonstrate the need for the Supreme Court's intervention to resolve the conflicts among the circuits. As cited by respondent, In re Albany, an Eleventh Circuit case, ordered the automatic stay to be lifted retroactively. In re Albany Partners, Ltd., 749 F.2d 670 (11th Circuit, 1984). However, contra, the Tenth Circuit Court held that a judgment rendered in violation of the automatic stay is void and of no effect. Zestee Foods, Inc. v. Phillips Foods Corp., 536 F.2d 334 (10th Cir. 1976); Meyer v. Rowen, 181 F.2d 715, at

716 (10th Cir. 1950). Numerous cites addressing the conflict and finding the order to be in violation of the automatic stay can be found in the petition under point I and II. There exists a true conflict among the circuits which needs to be addressed, including the effect of Bankruptcy Rule 6009, and settled by this Court.

LILCO in its response makes the argument that, had a motion to lift the automatic stay been filed in the lower court, the court would have granted an order lifting the stay. It is irrelevant whether or not the lower court would have lifted the automatic stay. This argument made by the respondent can be analogized with holding in a criminal proceeding that due process is not necessary because evidence favors the defendant's guilt.

Respondent correctly states that

cases are cited by the petitioner which involve litigation pending against the debtor at the time the bankruptcy was filed. This fact pattern fits the case at bar; however, even if the litigation commenced after filing bankruptcy, by a creditor, the automatic stay provided by 11 U.S.C. Section 362(1) would bar such litigation from continuing. As such, this entitles the debtor and the creditors the protection provided by the automatic stay regardless of whether the foreclosure action was filed before or after the bankruptcy.

On page eleven (11) of LILCO's opposing brief, LILCO clearly demonstrates the confusion between the Bankruptcy Rules and the Bankruptcy Code. The respondent correctly states that 11 U.S.C. §362 (1982 and Supp. V, 1987) clearly prohibits entities from proceeding with action against a debtor,

and the property of the estate, once the petition is filed. However, LILCO also states that the Bankruptcy Rule 6009 permits a debtor to commence an action while under the protection of the automatic stay. Such a conflict needs to be addressed by the Court so as to settle a conflict not only among the circuits in its interpretation, but also between the Bankruptcy Rules and the Bankruptcy Code.

REPLY TO POINT TWO OF RESPONDENT'S BRIEF IN OPPOSITION

BRC Waived Jury Trial Only on the Issue of Amount of the Debt Owed to LILCO

Petitioner did not stipulate to waiver of a jury trial on all issues. BRC reserved its rights and did not waive any rights on appeal as found in the Transcript at page 606. This was confirmed by the Court when the District Court Judge stated in the Court's Finding of Fact and Conclusions of Law

that it was "stipulated that LILCO's counterclaim should be submitted to the Court" which can be found in the Petition in the Appendix at page A-51. BRC stipulated waiver of the jury as to that issue only, the amount of indebtedness. The issue in which BRC waived the jury trial was on LILCO's counterclaim as to the debt plus interest demanded by LILCO. BRC conceded its debt to LILCO plus interest and stipulated to such, as found in the record at page 606. The record clearly indicates at page 608 that the only stipulation was to the debt and interest due. BRC did not stipulate to waiver of a jury trial on any other issue, and certainly not on the contract issue.

Reply to Point Two Concerning Trial Court's Findings and Conclusions

LILCO alleges in its response that the findings and conclusions have not

been challenged by the petitioner. However, the petitioner has done just that throughout the appeal proceedings. In its Petition here, and in the appeal to the Tenth Circuit Court, BRC specifically detailed the difference in the Court's findings and the actual evidence. If the Court elects to apply the standard of review set out by State Distributors, Inc. v. Glenn Moore Distilleries Company, 738 F.2d 405, 412 (10th Circuit 1984), the evidence presented by BRC is overwhelming and as such can meet that standard.

The trial court erred in holding as it did because the evidence is contrary to the findings and, hence, the conclusions. For example, LILCO's own witness, Hugh P. Boylan testified that it did not matter where the uranium came from. Boylan clearly testified in his deposition which was read into the

record at p. 588:

> We were negotiating a supply contract with Bokum. Whether that uranium came from the Marquez property or other properties was particularly of no interest to us. We were looking for pounds of uranium over a time period. That's what we were doing.
> (Emphasis added) Tr. at 588.

Boylan later testified that it did matter; however, he was impeached because of his contradictory statements. Nonetheless, the Court of Appeals erroneously relied on the contrary evidence and in fact cited to Boylan's testimony and in its order found in the Appendix of the Petition at page A-41. Said evidence, among the other evidence previously indicated, demonstrates that BRC's interpretation of the contract is accurate, or at the very least there was a fact issue that should have gone to the jury.

As another example, counsel for

LILCO stated at trial:

> That in a response letter by Mr. Bokum that refers back to that original tender, he reiterates that that tender of 2.2 million pounds and adds to it another seventy-one thousand pounds for the following month.
>
> At no time is there a communication in writing or oral between the parties that would indicate that if future contracts--tenders had been made, they would or would not have been rejected. Tr. at 498.

In effect, counsel is saying that if there are no communications in writing, then there is no evidence of a breach. However, it is clear from counsel's statements that LILCO had no intention of accepting any of the uranium. Counsel for LILCO also clearly conceded that the 1976 and 1978 uranium contracts were in full force and effect. Therefore, many factual issues exist which should have been presented to the jury for determination.

For the reasons given above and in the Petition for Writ of Certiorari, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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